Supreme Court, U.S.
FILED
NOV
JOSEPH F. SPANIOL, JR.
CLERK

90-782

NO.

# IN THE
# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1990

---

BOB ODOM, ET AL,
Petitioners

Versus

DONALD M. JOHNSON,
Respondent

---

**On Petition for a Writ of Certiorari**

**to**

**The United States Court of Appeals**

**For the Fifth Circuit**

---

## PETITION FOR CERTIORARI

**C. JAMES GELPI, P.C., Counsel of Record**
**J. KEITH HARDIE, JR.**
**203 Carondelet St., Suite 907**
**New Orleans, LA 70130**

**(504) 522-1153**

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

89

## QUESTION PRESENTED

Must a defendant seeking absolute quasi-judicial or prosecutorial immunity from suit under 42 U.S.C. Section 1983, in addition to establishing the existence of the procedural safeguards outlined in Butz v. Economou, 438 U.S. 478 (1978), also prove that he complied with the procedures providing those safeguards?

## LIST OF PARTIES

In accordance with Rule 14(b) the following is a list of all parties in the court whose judgement is sought to be reviewed:

Realtors: Bob Odom,, H.F. "Butch' Calhoun, John Impson, Jeff Calloway, Douglas Duty, Grady Coburn, Norvin Fagan, Robert Ewing, Jack Martin, John C. Moser, Lucas Terracina, Thomas Cascio.

Attorneys: C. James Gelpi, Counsel of Record.
J. Keith Hardie, Jr.

Respondents: Donald M. Johnson

Attorneys: Milton Dale Peacock

Not now seeking review: Dale Rinicker

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

ARGUMENT ..... 6

1. The Fifth Circuit Has Added a New Prong to Butz ... 8

2. Immunity is Not Dependent On Adherence to Procedure ..... 12

CONCLUSION ..... 15

CERTIFICATE OF SERVICE ..... 17

APPENDIX

A. Order of Court of Appeals, Fifth Circuit, No. 90-4007, October 4, 1990, Denying Rehearing . . . A-1

B. Opinion of Court of Appeals, Fifth Circuit, No. 90-4007, 910 F.2d 1273, September 7, 1990 . . B-1

C. Judgment of U.S. District Court for Western District of Louisiana, No. 87-1553-LC, December 7, 1989, Denying Motion For Summary Judgment and Reconsideration ..... C-1

D. Report and Recommendation of Magistrate, U.S. District Court for Western District of Louisiana, No. 87-1553-LC, October 31, 1989 ..... D-1

E. Memorandum Ruling, U.S. District Court for the Western District of Louisiana, No. 87-1553, February 6, 1989 ..... E-1

F. Order, U.S. District Court for the Western District of Louisiana, No. 87-1553, February 6, 1989 ..... F-1

G. Louisiana Revised Statutes 3: 3211-3214 ..... G-1

H. Acts of Louisiana Legislature, 1980, Act No. 330, amending La. R.S. 3:1631 ..... H-1

I. Acts of Louisiana Legislature, 1975, Act No. 779, amending La.R.S. 3:1631-3 ..... I-1

J. Louisiana Revised Statutes 49:955 et seq. (excerpts from Louisiana Administrative Procedure Act) ..... J-1

# TABLE OF AUTHORITIES

## CASES

Allen v. Louisiana State Bd. of Dentistry, 543 So.2d 908 (La. 1989) ..... 12

Austin Mun. Securities v. Nat'l Ass'n of Securities, 757 F.2d 676 (5th Cir. 1985) ..... 7

Butz v. Economou, 438 U.S. 478 (1978) . .....5-11, 13, 15

Cleavinger v. Saxner, 474 U.S. 193 (1985) ..... 11

Farrish v. Mississippi State Parole Bd., 836 F.2d 969 (5th Cir. 1988) ..... 7

Forrester v. White, 108 S.Ct. 538 (1988). ..... 14

Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988) ..... 13

Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949). ..... 14

Horowitz v. Board of Med. Examiners of State of Colo., 822 F.2d 1508 (10th Cir. 1987). ..... 7

Imbler v. Pachtman, 424 U.S. 409(1976) ..... 13

Johnson v. Odom, 470 So.2d 988 (La. App. 1st Cir. 1985) ..4

Johnson v. Odom, 536 So.2d 541 (La. App. 1st Cir. 1988) ..4

McCoy v. Gordon, 709 F.2d 1060 (5th Cir. 1983), cert. denied, 472 U.S. 1030 (1983) ..... 13

Mitchell v. Forsyth, 472 U.S. 511, 522, 105 S.Ct. 2806, 86 L.Ed. 411 (1985). ..... 10

Scott v. Central Me. Power Co., 709 F.Supp. 1176 (D.Me. 1989) ..... 7, 12

Segarra v. McDade, 706 F.2d 1301 (4th Cir. 1983) ..... 7

Shelly v. Johnson, 849 F.2d 228 (6th Cir. 1988) ..... 7

Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) ..... 7, 12

Stump v. Sparkman, 435 U.S. 349 ..... 13

Ward v. Johnson, 690 F.2d 1098 (4th Cir. 1982) ..... 7

## STATUTES

28 U.S.C. Section 1254(1). ..... 2

42 U.S.C. 1983 ..... 2

La. R.S. 3:1631-33 (repealed) ..... 2, 8, 11, 12

La. R.S. 3:3211-3214 ..... 2, 8, 11, 12

La. R.S. 49:950 et seq. ..... 2, 8, 11, 12

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1990**

**BOB ODOM, ET AL**

**PETITIONERS**

**VERSUS**

**DONALD MACK JOHNSON**

**RESPONDENT**

**On Petition for a Writ of Certiorari to**
**the United States Court of Appeals**
**For the Fifth Circuit**

---

## PETITION FOR CERTIORARI

**MAY IT PLEASE THE COURT:**

Petitioners, Bob Odom, the Commissioner of the Louisiana Department of Agriculture and Forestry, H.F. "Butch" Calhoun, John Impson, Jeff Calloway, Douglas Duty, Grady Coburn, Norvin Fagan, Robert Ewing, Jack Martin, John C. Moser, Lucas Terracina, and Thomas Cascio pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit entered on September 7, 1990, rehearing denied October 4, 1990.

## CITATIONS TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth

Circuit is found in the appendix hereto and is reported at 910 F.2d 1273 (5th Cir. 1990). The decisions of the United States District Court for the Western District of Louisiana, No. 87-1557-LC, are found in the Appendix hereto and are unreported.

## JURISDICTION

Petitioners seek review of a judgment of the Fifth Circuit rendered on September 7, 1990, and of the denial of a petition for rehearing on October 4, 1990. This Court has jurisdiction to review civil cases in the courts of appeal by writ of certiorari granted before or after rendition of judgement or decree pursuant to 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 - Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Louisiana Law - Louisiana statutes relevant to this case include the Louisiana Administrative Procedure Act, La. R.S. 49:950 et seq., and Louisiana Pesticide Laws, La. R.S. 3:3211-3214 and La. R.S. 3:1631-33 (repealed), the relevant portions of which appear in the Appendix hereto.

## STATEMENT OF THE CASE

Petitioners, defendants below, are Bob Odom, the Commissioner of the Louisiana Department of Agriculture and Forestry (hereinafter "the Commissioner" and "the Department"), H.F. "Butch" Calhoun, Director of Pesticides and Environmental Programs during the relevant period, John Impson, the Assistant Commissioner or Agriculture, and nine current and former members of the Advisory Commission on Pesticides (hereinafter "the Commission"), specifically, Jeff Calloway, Douglas Duty, Grady Coburn, Norvin Fagan, Robert Ewing, Jack Martin, John C. Moser, Lucas Terracina, and Thomas Cascio. Defendant Dale Rinicker, Sheriff of East Carroll Parish, is not currently requesting writ of certiorari.

Respondent, plaintiff below, is Donald Mack Johnson, a resident of Louisiana, who, along with his corporation, Transylvania Flying Services ("TFS"), was, at the time the events alleged in this suit began, licensed by the State of Louisiana to apply pesticides aerially; in other words, he was a crop duster. This suit arises indirectly out of four adjudicatory proceedings[1] before the Commission in which Johnson and TFS were charged with violating Louisiana pesticide laws. Among other offenses, Johnson was charged with applying restricted pesticides without required waivers, illegally applying Azodrin, which is used to kill birds, to rice fields, spraying human beings with harmful pesticides, and striking a department employee who was at-

---

[1] The hearings were held on December 7, 1982, April 5, 1983, July 13, 1983, and November 11, 1984.

tempting to serve him with process[2]. Johnson was given written notice advising him of the nature of the charges and of his right to appear with counsel, present evidence, examine the evidence presented against him, cross-examine witnesses, and make arguments. See Notices, ftn. 2, supra. Johnson appeared and participated, often represented by counsel, and the proceedings were duly recorded. See Minutes, ftn. 2, supra.

As a result of these proceedings, fines were levied and Johnson's certification and TFS's license were initially suspended and eventually revoked. Johnson appealed every ruling to the state district and appellate courts, and some of the penalties were modified. See Johnson v. Odom, 470 So.2d 988 (La. App. 1st Cir. 1985), writ denied, 476 So.2d 355 (1985) (appeal of first three hearings) and Johnson v. Odom, 536 So.2d 541 (La. App. 1st Cir. 1988),writ denied, 537 So.2d 213 (1989) (appeal of fourth hearing). Other state court litigation involving the same facts alleged herein ensued when the Department filed to enforce its rulings and Johnson counterclaimed. Johnson also filed other state court suits alleging essentially the same facts alleged herein. See Exhibits D3, D4, D5, and D7, attachments to the Record at p. 63.

Johnson then filed the instant 1983 action, essentially alleging that the Commission had ruled against him after having been contacted by staff members Impson and Calhoun, whom Johnson alleges were seeking revenge for the latter's alleged refusal

---

[2] The notices and minutes from these hearings are attached to the record at page 63, denominated as Exhibits D1, D2, D6, and D7, and as Attachments to D7 marked Exhibits A, F, and J. They are also found in the Record Excerpts of the Appellants / Defendants before the Fifth Circuit, where they are Excerpts F, G, H, J, K and L.

to make a campaign contribution. Defendants answered, once again denying Johnson's allegations, as they had in the aforementioned several state court proceedings.

Defendants filed a motion to dismiss, claiming, inter alia, absolute quasi-judicial and prosecutorial immunity pursuant to Butz v. Economou, 438 U.S. 478 (1978). On February 6, 1989, the Western District of Louisiana, Monroe Division, denied defendants' claims of absolute immunity but dismissed a Section 1985 claim and all claims against the Department. See Appendix, p. F-1, E-7. Defendants then filed a "Motion for Summary Judgement and to Reconsider." Record, p. 255. Again, the claims of immunity were denied. Appendix, p. C, D-8.

The defendants appealed the denial of immunity to the Fifth Circuit under the "collateral order doctrine." The Fifth Circuit affirmed the denial of absolute immunity, finding that "under the facts asserted by the defendants, they failed to show that the Butz safeguards were present." (Emphasis added.) In reaching its decision, the court made no analysis of the procedural protections afforded Johnson under Louisiana law. See Appendix, p. B-9. The defendants requested rehearing, pointing out that the question of whether the Butz safeguards were present was a question of law to be determined by analysis of the procedural protections afforded Johnson by Louisiana law. In denying the petition for rehearing, the Fifth Circuit recognized that defendants "cite to the existence of the Louisiana Administrative Procedure Act (LAPA or the Act) to show that the 'proper safeguards' exist," but nonetheless held that the "mere presence of an administrative procedure . . . is insufficient to 'show that the Butz safeguards are present'." Appendix, p. A-2. The court held that, in order to be afforded absolute quasi-judicial immunity, these officials "must show that they followed the administrative pro-

cedure when adjudicating the plaintiff's claim." Appendix, p.A-2. From that holding, this appeal is taken.

## ARGUMENT

The issue is whether the petitioners, who are administrative adjudicatory officials[3], must prove that they complied with state administrative procedure in order to have absolute quasi-judicial or prosecutorial immunity. The Fifth Circuit erred in holding that proof of compliance with procedural law is a prerequisite for the absolute quasi-judicial immunity afforded by Butz v. Economou, 438 U.S. 478 (1978) to executive department officials performing adjudicatory or prosecutorial functions.

---

[3] Though the Fifth Circuit stated in its Decision on Rehearing that the rehearing was requested by the members of the Advisory Commission on Pesticides, Rehearing was requested by "all defendants, but most especially as to the ACP members." Appendix, p. A-1, Petition for Rehearing, p. 9. Along with the ACP members, Bob Odom, the Commissioner, and staff members John Impson and Butch Calhoun also seek a writ of certiorari in this court.

In denying the petition for rehearing[4], the Fifth Circuit held:

> Petitioners cite to the existence of the Louisiana Administrative Procedure Act (LAPA or the Act) to show that the "proper safeguards" exist in this case. The mere presence of an administrative procedure, however, is insufficient to "show that the Butz safeguards are present." In order to be afforded absolute immunity, the petitioners must show that they followed the administrative procedure when adjudicating the plaintiff's claim. As we stated in our opinion, the defendants failed to show they complied with the Act.

---

[4] Though the error complained of is stated explicitly in the Fifth Circuit's opinion on rehearing, the court had already misconstrued the Butz test in its original opinion by implying that the question of whether the safeguards were present was one of fact, rather than one of law. The Fifth Circuit held that, "under the facts asserted by the defendants, they failed to show that the Butz safeguards were present." Appendix, p. B-9. This was clear error because the issue of the presence of sufficient procedural safeguard had been treated, in Butz and in numerous court of appeal and district court cases, as a question of law to be determined by measuring the applicable state procedural rules against the requirements of Butz. See, e.g., Austin Mun. Securities v. Nat'l Ass'n of Securities, 757 F.2d 676 (5th Cir. 1985); Ward v. Johnson , 690 F. 2d 1098 (4th Cir. 1982); Segarra v. McDade, 706 F. 2d 1301 (4th Cir. 1983); Farrish v. Mississippi State Parole Bd., 836 F. 2d 969 (5th Cir. 1988); Shelly v. Johnson, 849 F. 2d 228 (6th Cir. 1988); Scott v. Central Me. Power Co., 709 F.Supp. 1176 (D.Me. 1989); Simons v. Bellinger, 643 F. 2d 774 (D.C. Cir. 1980), Horowitz v. Board of Med. Examiners of State of Colo., 822 F. 2d 1508 (10th Cir. 1987).

On rehearing, the Fifth Circuit recognized that the question of the safeguards was a legal question, but committed further error in adding the requirement that the defendants prove compliance. Apendix, p. A-2

> . . . Because the petitioners did not proffer any facts in their motion for summary judgement or in the instant petition to show that they did in fact abide by the Act in their adjudication of Johnson's claim, they did not allege "facts" sufficient to show the Butz safeguards were in fact present.
>
> Order on Rehearing, p. 2., Appendix, p. A-2.

This is clear error, for it adds a new prong to the Butz test and would require judicial officers seeking immunity to prove that they had complied with procedural law[5], essentially shifting the plaintiff's burden of proof in his case in chief to the judicial officer seeking immunity.

1. **The Fifth Circuit Has Added a New Prong to Butz**

The Fifth Circuit's requirement that the defendant officials "proffer . . . facts . . . to show that they did in fact abide by the Act in their adjudication of Johnson's claim" adds a wholly new

---

[5] The Louisiana Administrative Procedure Act was applicable to adjudicatory hearings conducted by the department at all relevant times. La.R.S. 49:950 et seq. Prior to January 1, 1983, the makeup of the Advisory Commission on Pesticides was governed by La. R.S. 3:1631-33 (Act 779 of the 1975 Louisiana Legislature, as amended by Act 300, 1980). See Appendices, H and I . In 1982, the law was amended, and the pesticide law effective during most of the events complained of is found at La.R.S. 3:3211-14. Appendix, p. G-1.

requirement to Butz[6], one that vitiates the purpose of immunity by requiring the defendants to disprove plaintiff's case in chief in order to obtain an immunity which is supposed to prevent the necessity of a trial in the first place. Neither Butz nor any other case makes such a requirement[7]. It is well settled that the purpose

---

[6] Butz established a tripartite test for absolute quasi-judicial immunity, requiring a defendant to prove:

> i) the official's functions share the characteristics of the judicial process:
> ii) the official's activities are likely to result in recriminatory lawsuits by disappointed parties; and
> iii) sufficient safeguards exist in the regulatory framework to control unconstitutional conduct.

See Butz, 438 U.S. at 510-13.

The district court, noting that the "Commissioner of Agriculture and the Commission serve as a fact finding body," established that the first two prongs had been met, and they were never a subject of dispute below. Appendix, p.D-8. This case thus turns on whether the third prong requires defendants to prove that they abided by the state administrative procedures act. There is no such requirement, since the determination is one of law and does not hing upon any "facts" required to be proven.

[7] Even if there was such a requirement, the court erred in holding that the defendants failed to proffer facts establishing that Johnson was afforded his procedural rights. The notices and minutes of the various hearings, and the records of the appeals appear at least twice in the record: once as the Exhibits to Defendants' Motion to Dismiss, attached to the Record at page 63, and again in the Record Excerpts and Addenda to defendants' Fifth Circuit Appeal. These documents establish that Johnson had adequate notice, that he enjoyed the opportunity to appear and defend himself, and that he pursued his rights vigorously on appeal through the states's judicial system.

of official immunity is to protect public officials from the "mere threat of litigation" by allowing them to assert an immunity defense early in the proceedings, without having to become entangled in factual considerations. Mitchell v. Forsyth, 472 U.S. 511 (1985).

The Fifth Circuit's opinion stands alone in holding that a quasi-judicial defendant must prove compliance with administrative procedure in order to claim immunity. This Court, in Butz, afforded absolute immunity to federal adjudicatory officials simply because "federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process." Butz, 438 U.S. at 513. This Court expressly recognized the risk that some unconstitutional acts might take place at administrative hearings, but, for valid and important reasons, decided to afford immunity to administrative officials who were subject to procedural restraints:

> In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgement of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.
>
> Butz, supra, 438 U.S. at 514 (emphasis added).

In Butz, this Court made a determination that, when administrative officials are constrained by checks similar to those in the

judicial system, they should have immunity. The immunity is absolute precisely because it is not contingent upon factual proof. The state law governing Johnson's hearings provided such checks, and that alone is sufficient to confer immunity on the defendants.

Louisiana law meets the Butz test by providing the safeguards traditionally found in the judicial process, including full judicial review. First, adjudicatory hearings before the commission are adversary in nature and required to be conducted pursuant to the Louisiana Administrative Procedure Act. La.R.S. 3:3214(4); La. R.S. 49:967 et seq.; La. R.S. 3:1632 (repealed), Appendices G, I, J.

Second, the commission is insulated from political influence. Though the Commission members are appointed by the Commissioner, eight of the nine members must be chosen from lists of three persons provided by various organizations, and each appointment must be confirmed by the state senate. La. R.S. 3:3211 (B). The commissioners are required to be selected from different backgrounds, ranging from aerial applicators to private farmers, and could be expected to defend interests as contradictory as those of the Louisiana Pesticide Applicators Association and the Louisiana Wildlife Federation. See La. R.S. 3:3211[8].

Most importantly, the commissioners are not employees of the Department of Agriculture, and they receive no salary, but only a per diem not to exceed forty dollars for each day on which they

---

[8] Prior to January 1, 1983, Commissioners were not required to be confirmed by the Senate and were selected from somewhat different organizations, but interests as varied as shrimpers and pest management consultants were represented. See Louisiana Acts 1975, No. 779 and Acts 1980, No. 330, Appendix, pp. H-1, I-1.

attend meetings. La. R.S. 3:3211 (H); La. R.S. 3:1631 (repealed). Cf. Cleavinger v. Saxner, 474 U.S. 193 (1985) (Prison discipline committee, made up of employees subordinate to warden, was not independent and thus not entitled to absolute immunity.) The commissioners cannot be fired, given other duties, transferred, reprimanded, etc. They are financially independent of the Commissioner, and could be expected to exercise independent judgement. They are prohibited from making ex-parte communications, and violations of this rule can be raised on appeal. La. R.S. 49:960; Allen v. Louisiana State Bd. of Dentistry, 543 So.2d 908 (La. 1989).

Third, the parties are entitled to present their case by oral or documentary evidence, and findings of fact are based exclusively on the evidence and on matters officially noticed. La.R.S. 49:955 (C) and (G), La. R.S. 3:1633 (C)(repealed); Appendix, pp. J-1, I-4. Fourth, adverse decisions are required to be in writing or stated in the record and must include findings of fact and conclusions of law. La.R.S. 3:3214; La. R.S. 49:958, La. R.S. 3:1633 (C) (repealed); Appendix, pp. G-5, J-6, I-4.

Finally, any error is correctable by judicial review, which includes the right to put on proof of alleged procedural irregularities not shown on the record. La.R.S. 3:3214 (7); La. R.S. 49:964; La. R.S. 3:1633 (D); Appendix, pp. G-6, J-9, I-4. Johnson appealed every one of the administrative decisions to the state district and appellate courts, but even if he had not, he could not be heard to complain. "It is immaterial that [Johnson did not] avail himself of these safeguards . . . so long as he could have done so under [Louisiana] law." Scott v. Central Maine Power Co, 709 F. Supp. 1176 (D. Me. 1989).

2. **Immunity is Not Dependent On Adherence to Procedure**
Entitlement to quasi-judicial immunity is not dependent upon

compliance with procedural law; an official is entitled to immunity provided there are "checks capable of deterring, or correcting, unconstitutional conduct." Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980). Defendants, who are members of the executive branch performing judicial and prosecutorial functions, are, under Butz, to be afforded the same immunity as judges and prosecutors[9]. They are entitled to immunity not only for acts which violate procedural rules but also for those done out of malice:

> [t]he informal and ex parte nature of a proceeding has not been thought to imply that an act otherwise within a

---

[9] Odom and the members of the Commission should enjoy absolute quasi-judicial immunity. Impson and Calhoun are agency officials who make prosecutorial decisions and are thus also entitled to absolute prosecutorial immunity. Butz, supra, 438 U.S. 478 at 515-16. Impson, as Assistant Commissioner for Agriculture and Environmental Sciences, and Calhoun, as Director of Pesticide and Environmental programs, performed prosecutorial functions such as filing charges and recommending penalties. Affidavits of Impson and Calhoun at Record, p. 167-70.

The sum and substance of Johnson's claim against Impson and Calhoun is that they targeted him for prosecution, that they encouraged perjury against him, and that they attempted to influence the members of the Commission. Amended Complaint, para. XXVIII, XXXV, Record at p. 135. Even if Johnson had proof of these allegations, however, Impson and Calhoun would be absolutely immune. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors absolutely immune for decisions to initiate prosecution); McCoy v. Gordon, 709 F.2d 1060 (5th Cir. 1983), cert. denied, 472 U.S. 1030 (1983) (presentation of perjured testimony protected by immunity doctrine); Geter v. Fortenberry, 849 F2d 1550 (5th Cir. 1988) (even if prosecutor improperly influenced setting of trial, he was shielded by absolute immunity).

> judge's lawful jurisdiction was deprived of its judicial character. See Stump v. Sparkman, 435 U.S. 349, 363, n. 12, 98 S.Ct. 1099, 1108, n. 12, 55 L.Ed.2d 331(1978). Similarly, acting to disbar an attorney as a sanction for contempt of court, by invoking a power "possessed by all courts which have authority to admit attorneys to practice," does not become less judicial by virtue of an allegation of malice or corruption of motive.
>
> Forrester v. White, 108 S.Ct. 538 at 544 (1988).

Without immunity, those charged with administrative adjudications would hesitate to render decisions adverse to any party before them. In 1949, Learned Hand explained that such immunity is indispensable to a functioning judiciary:

> The justification for [absolute immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . . As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.
>
> Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

Absolute judicial immunity is just that: absolute. It is intended to protect the integrity of those performing judicial functions by shielding their decisions from collateral attack. The acts which Johnson alleges caused him injury — the findings of fact and law made by the defendants and the imposition of penalties and fines based on those decisions — were indisputably judicial in function[10]. Thus, even if some of the procedural protections afforded by Louisiana law were somehow thwarted — which is denied and contrary to the evidence[11] — defendants are nonetheless entitled to immunity. The Fifth Circuit's ruling, which would require every judge made defendant in a §1983 action to prove that he had abided by every single procedural rule applicable to the case before him, would paralyze the state and federal judiciary, as well as the innumerable administrative bodies which rule on hotly contested claims daily. This appendage to the Butz test is unworkable, unnecessary, and absolutely at odds with the decisions of this court and the purpose of absolute immunity.

## CONCLUSION

Under the Fifth Circuit's ruling, the Butz test for absolute immunity is no longer a primarily legal inquiry — whether the statutory protections afforded are sufficient to minimize the risk of unconstitutional conduct — but a factual one — whether the statutory provisions were followed. That is not and cannot be the

---

[10] The district court so found, holding that "the Commissioner of Agriculture and the Commission serve as a fact finding body". Report and Recommendation of Magistrate, Appendix, p. D-8.

[11] See attachments to the Record cited in footnote 2, supra, clearly establishing that Johnson received adequate notice, was afforded several hearings, and took exhaustive appeals.

law, for judges and quasi-judicial figures must be able to act without fear of later having to justify their decisions as defendants in a 1983 action. Butz and its progeny have established a clear and simple rule: those performing judicial acts — which are to be broadly construed as those not taken in clear absence of all jurisdiction — are immune from suits for damages, so long as certain procedural safeguards protect the litigants who come before them.

The Fifth Circuit's decision changes this law and invites Section 1983 attacks against judges and administrative adjudicatory officials. It places serious factual impediments in the path of officials seeking absolute immunity. In order to prevent further confusion concerning the Butz test, this court should grant certiorari and reverse the Fifth Circuit.

Respectfully submitted,

C. JAMES GELPI
ATTORNEY FOR PETITIONERS
203 Carondelet Street
Suite 907
New Orleans, LA 70130
Telephone (504) 522-1153

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Petition for Writ of Certiorari have been mailed, postage prepaid, to Mr. Milton Dale Peacock, One Wood Street, Monroe, Louisiana 71201. I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this _____ day of

November, 1990.

_____

# APPENDIX

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

No. 90-4007
Summary Calendar

**DONALD M. JOHNSON,**
Plaintiff-Appellee,
versus

**BOB ODOM, ET AL.,**
Defendants-Appellants.

October 4, 1990

Appeal from the United States District Court for the
Western District of Louisiana
(CV 87-1553-M)

ON PETITION FOR REHEARING

Before GEE, SMITH, and WIENER, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

Petitioners, members of the Advisory Commission on Pesticides (ACP), request rehearing concerning their claim for absolute judicial immunity.

In the above entitled case, we held that "under the facts asserted by the defendants, they failed to show that the Butz safeguards

were present." Johnson v. Odom, No. 90-4007, slip op. at 5983 (5th Cir. Sept. 7, 1990). The petitioners argue that the presence of the Butz safeguards is a question of law and this court erred in treating the issue as one of fact. Petitioners also argue that their function in the Johnson matter was purely judicial or quasi-judicial, and therefore, they are entitled to absolute immunity under the Supreme Court's reasoning in Butz v. Economou, 483 U.S. 478 (1978). Butz does in fact state that when executive department officials serve in capacities comparable to judges or prosecutors, they serve as quasi-judicial officers and are absolutely immune from suit. Id. at 513. This immunity, however, presumes that proper "safeguards" exist in theregulatory framework to inhibit unconstitutional conduct. See Horwitz v. Board of Medical Examiners, 822 F.2d 1508, 1515 (lOth Cir. 1987).

Petitioners cite to the existence of the Louisiana Administrative Procedure Act (LAPA or the Act) to show that the "proper safeguards" exist in this case. The mere presence of an administrative procedure, however, is insufficient to "show that the Butz safeguards are present." In order to be afforded absolute immunity, the petitioners must show that they followed the administrative procedure when adjudicating the plaintiff's claim. As we stated in our opinion, the defendants failed to show they complied with the Act.

In the instant case, Johnson set forth sufficient facts at least to allege that the ACP was politically influenced by Odom and did not act independently (both are requirements of the LAPA and Butz). Because the petitioners did not proffer any facts in their motion for summary judgment or in the instant petition to show that they did in fact abide by the Act in their adjudication of Johnson's claim, they did not allege "facts" sufficient to show the Butz safeguards were in fact present.

It is appropriate at this juncture to allow a trier of fact to determine if, in fact, the ACP complied with the LAPA in Johnson's hearings. For the foregoing reasons, the petition for rehearing is DENIED.

# UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

No. 90-4007
(Summary Calendar)
910 F.2d 1273 (5th Cir. 1990)

Donald M. JOHNSON,
Plaintiff-Appellee,

versus

Bob ODOM, et al.,
Defendants-Appellants.

Sept. 7, 1990.

Appeal from the United States District Court for the Western District of Louisiana

Before GEE, SMITH and WIENER, Circuit Judges.

PER CURIAM:

Defendants appeal from the district court's denial of their motion for summary judgment seeking dismissal of their suit on the basis of immunity. Finding no reversible error, we affirm.

I.

Plaintiff-Appellee, Donald M. Johnson ("Johnson") filed suit against Bob Odom, Commissioner of Agriculture, H.F. "Butch"

Calhoun and John Impson[1], several members of the Louisiana Advisory Commission on Pesticides[2], and Dale Riniker, Sheriff of East Carroll Parish ("Defendants") pursuant to 42 U.S.C. 1983. Johnson alleged that the defendants violated his civil rights by interfering with his business activities and attempting unlawfully to gain evidence against him for use in adjudicatory hearings that resulted in revocation of Johnson's crop-duster's license[3]. The defendants filed a motion for summary judgment[4] which in pertinent part pleaded absolute or qualified immunity from prosecution. The district court denied the motion, stating that none of the defendants were entitled to absolute immunity and that genuine issues of material fact exist as to the defendants' claims for qualified immunity. On motion for reconsideration, the defendants proffered depositions to "clarify" the plaintiff's affidavits. The district court refused to consider the depositions, reasoning that to do so would require the court to weigh the evidence. The defendants appeal the denial of immunity. We affirm the district court's determinations that (l) the defendants

---

[1] Both Calhoun and Impson are employees of the Louisiana Department of Agriculture.

[2] Jeff Calloway, Douglas Duty, Grady Coburn, Norvin Fagan, Robert Ewing, Jack Martin, John C. Moser, Lucas Terracina, and Thomas Cascio.

[3] Johnson's claim is brought under the substantive and procedural due process provisions of the Fourteenth Amendment and under the First, Fourth and Fifth Amendments.

[4] The defendants initially brought Fed.RCiv.P 12(b) motion for dismissal. Because the motion presented matters outside the pleadings, the court treated it as a motion for summary judgment.

are not entitled to absolute immunity status and (2) a material issue of fact exists as to the defendants' claims for qualified immunity making summary judgment improper.

II.

A.

Facts Alleged by Plaintiff

Donald M. Johnson was a crop-duster in East Carroll parish when he was approached on various occasions in 1980 and 1982 to contribute money to the campaign of Bob Odom, Louisiana's Commissioner of Agriculture. When he refused, the members of the Pesticide Control Commission retaliated by charging him with various violations of Louisiana's Pesticide Law, La. Rev.Stat.Ann. § 3:1601 et seq. (repealed 1982), amended by, La.Rev.Stat.Ann. § 3:3201-3280 (West 1990). Officials in the Department of Agriculture ("DOA") encouraged perjured testimony to assist Odom in adjudicating Johnson guilty and "made an example of him" by singling him out for prosecution and revocation of his license. Johnson submitted several affidavits to this effect.

B.

Facts Alleged by Defendants

The DOA received a complaint from a farmer, Kenneth Frith, in June 1980, that his crop was damaged by aerial application in nearby fields of Phenoxy-2,4,5,-T. Tommy Shields, then a new investigator for the DOA, determined that the damage was done by Johnson and another applicator. Shields' conclusions were rejected by a more experienced investigator who determined that

Johnson alone was responsible. Another incident involving Johnson occurred in June, 1981, when the DOA determined that Johnson had again applied the regulated substance, Phenoxy-2,4,-T, without authorization [Johnson claims oral authorization through Shields which Shields denies]. It was the second incident that triggered the adjudicatory hearings against Johnson. There were also complaints against Johnson for spraying chemicals on departmental inspectors and for striking an inspector when he attempted to serve a complaint on Johnson.

III.

The defendants argue that in the proceedings against Johnson, Odom and the Commission members served in a judicial capacity and are therefore absolutely immune from prosecution. In the alternative, the defendants argue that they are at least entitled to qualified immunity because the actions taken against Johnson were not unreasonable[5]. Johnson claims that the defendants are not entitled to immunity because their acts went beyond their mere decision-making role.

---

[5] This appeal illustrates a recurring problem faced by courts when called upon to determine a defendant's immunity in the context of a summary judgment. The court must make its decision on allegations and supporting affidavits without the benefit of fact-finding. The court must determine whether or not the plaintiff's allegations state a claim, without considering the correctness of the plaintiff's version of facts. Doing so has produced a hodgepodge of cases, each seeming to have little relationship to the others and producing no "clear bright line" for determining when immunity will or will not be granted. But this case and its predecessors also illustrate that it would be folly for this court to attempt to create such a bright line because of the limited scope of this kind of appeal and the limited facts upon which we must base our decisions.

## IV.

The denial of summary judgment is not a final judgment and is ordinarily not appealable. Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir.1989). However, "appeals from the denial of qualified or absolute immunity are a well recognized exception to th[is] general rule." Loya v. Texas Dept. of Corrections, 878 F.2d 860, 861 (5th Cir.1989) (citing Mitchell v. Forsyth, 472 U.S. 511, 525-28,105 S.Ct. 2806, 2814-17, 86 L.Ed.2d 411(1985)). An appeal may be taken from a finding against qualified immunity

> where the issue involved is the purely legal one of "whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took."

Thompson v. City of Starkville, 901 F.2d 456, 459 (5th Cir.1990) (quoting Mitchell, 472 U.S. at 528 & n. 9, 105 S.Ct. at 2816 & n. 9). The plaintiff must show that, at the time of the alleged violation, the defendants actions were such that a reasonable officer would know they were unlawful. Cf. Connelly v. Comptroller of the Currency, 876 F.2d 1209, 1212 (5th Cir.1989). This review is de novo because the court resolves only a question of law. Id.; Geter v. Fortenberry, 882 F.2d 167, 169 (5th Cir. 1989) (Geter II).

Factual allegations are examined "only to determine whether they would be sufficient, if proven, to make out a violation of

clearly established law." Geter II, 882 F.2d at 169 (footnote omitted). Where "disputed factual issues material to immunity are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." Feagley, 868 F.2d at 1439. Therefore, this court need not reach a legal conclusion as to the defendants' qualified immunity if we find that the district court was correct in finding material facts in dispute. That in turn, depends on an initial finding that Johnson's factual allegations, if proven, make out a violation of "clearly established law." We address the second issue first.

Johnson's claim for relief rests on the allegations that the Department of Agriculture, through the named defendants, (1) encouraged perjured testimony to facilitate adjudicating him guilty of violating Louisiana's Pesticide Control laws and (2) singled him out for prosecution and revocation of his license using illegally obtained evidence[6]. Such actions, if true, would violate Johnson's due process rights. See generally United States v. Snoddy, 862 F.2d 1154,1156 (5th Cir.1989). If those allegations prove to be true, then the defendants' behavior "is not of a nature that any reasonable official could possibly have thought legitimate." Thompson, 901 F.2d at 470. Therefore, the allegations were sufficiently specific to demonstrate that the defendants were not entitled to qualified immunity. Cf. Id. at 469 & n. 13. Having determined that Johnson pleaded facts sufficient to overcome the presumption of immunity, we next must determine whether the district court's denial of summary judgment on the question of the defendants' absolute and qualified immunities was proper.

This court reviews the grant of summary judgment motion de novo, using the same criteria used by the district court in the first

---

[6] Johnson submitted ten supporting affidavits.

instance. Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir.1988). We "review the evidence and inferences to be drawn therefrom in the light most favorable to the non-moving party." Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir.1986) (per curiam) (citing Southmark Properties v. Charles House Corp., 742 F.2d 862, 873 (5th Cir. 1984)). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R. Civ.P. 56(c). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986) "Material facts" are "facts that might affect the outcome of the suit under the governing law." Id.

The district court denied defendants' motion for summary judgment because Johnson's allegations create a factual dispute as to the propriety of the actions taken against him by all of the defendants involved. The affidavits submitted by Johnson support his allegations that the defendants encouraged others to commit perjury against Johnson and sought to harm his business by singling him out for prosecution and for revocation of his cropduster's license. Inferences drawn from underlying facts "must be viewed in a light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

In this case the allegations that the defendants encouraged perjury and deliberately sought to harm Johnson by singling him out for prosecution are material to the question of whether the parties claiming immunity knew their actions were such that a

reasonable officer would know he was violating a clearly established law. See Thompson, 901 F.2d at 469; Geter II, 882 F.2d at 169. Therefore, if those alleged facts are in dispute, denial of summary judgment is appropriate.

After the district court denied the defendants' motion for summary judgment, they proffered depositions in an effort to "clarify" the affidavits and resolve factual discrepancies, hoping to eliminate any factual dispute and gain summary judgment. The district court refused to consider those depositions, reasoning that were it to conclude that such clarification overcomes the affidavits would call for the court to weigh the evidence, a clearly inappropriate action by a court deciding a motion for summary judgment.

But this court need not reach the issue of whether the district court erred in refusing to consider the depositions because, rather than clarifying the facts contained in the affidavits, the depositions obscure the "facts" and support Johnson's argument that the dispute about the facts affecting immunity is genuine. Therefore, the district court was correct in denying defendants' motion summary judgment on the issue of qualified immunity.

The district court also held on summary judgment that none of the defendants[7] were entitled to absolute immunity. It reasoned

---

[7] The defendants argue on appeal that the district court erred by failing to consider each defendant separately. Because this appeal is limited to the issue of immunity the question of individual consideration will be discussed only as it pertains to the immunity issue.

In the instant case the actions of the members of the commission, Odom, and the Department of Agriculture employees are so intertwined that separation without extensive finding of fact as to the individual actions of each is impracticable. Because each of the

correctly that for an official to demand such protection, he must show (l) that the responsibility of his office embraces a function so sensitive as to require a total shield from liability; and (2) that he was discharging the protected function when he performed the act for which liability is asserted. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Under the holding in Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) administrative officials may be afforded absolute immunity if (l) those administrators serve a judicial function; (2) the officials' actions subject them to retaliatory suits; and (3) the process of agency adjudication is so structured that sufficient safeguards exist in the regulatory framework to inhibit unconstitutional conduct. See also Horwitz v. Board of Medical Examiners, 822 F.2d 1508 (lOth Cir.1987).

The district court determined that the duties of the defendants were not so sensitive as to require a total shield from liability and that, under the facts asserted by the defendants, they failed to show that the Butz safeguards were present. In addition, Johnson's pleadings and affidavits contained allegations that Odom and the Commission members went beyond the scope of their decision-making authority when they committed the alleged wrongs.

---

defendants, as a practical matter, stand in the same position as to immunity, it was proper for all of them to be considered together on this issue. Although the jury may later decide that one or more of the defendants did not act as alleged, that is not a proper consideration at the summary judgment stage of the proceedings.

We agree that on the basis of the limited evidence available for consideration, the defendants were not entitled to absolute judicial immunity. This also holds true for the absolute prosecutorial immunity asserted by Impson and Calhoun.

For the foregoing reasons, the district court's denial of summary judgment is AFFIRMED[8].

---

[8] We do not imply that the defendants may not prevail at trial, either on the merits or on qualified immunity. In the context of a summary judgment at this stage of the proceedings however, there is insufficient evidence to find for the defendants because it appears that material factual issues are in dispute. We recognize that these issues should be resolved by a fact-finder on the merits and not on summary judgment.

B-11

# UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 90-4007
Summary Calendar

D.C. Docket No. CV 87 1553 M

**DONALD M. JOHNSON,**
Plaintiff-Appellee,

versus

**BOB ODOM, ET AL.,**
Defendants-Appellants.

September 7, 1990

Appeal from the United States District Court for the Western District of Louisiana

Before GEE, SMITH and WIENER, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the District Court denial of summary judgment in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the cost on appeal to be taxed by the Clerk of this Court.

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION**

CIVIL ACTION NO. 87-1553-LC

**DONALD M. JOHNSON**
VS.
**BOB ODOM, ET AL**

DECEMBER 7, 1989

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate previously filed herein, and after an independent review of the record and a de novo determination of the issues, and after determining that his findings are correct under the applicable law;

IT IS ORDERED that defendants' motion for summary judgment and to reconsider the court's previous ruling be and same is hereby denied.

THUS DONE AND SIGNED in Chambers, at Lake Charles, Louisiana, on this 7th day of December, 1989.

/SIGNED/
EARL E. VERON
UNITED STATES DISTRICT JUDGE

# IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

CIVIL ACTION NO. 87-1553-LC

**DONALD M. JOHNSON**
VS.
**BOB ODOM, ET AL**

OCTOBER 31, 1989

REPORT AND RECOMMENDATION OF MAGISTRATE

The matter before the undersigned is a motion for summary judgment and to reconsider the court's ruling on a previous motion for summary judgment. The motion is filed by defendants. Plaintiff opposes the motion.

Factual Background

Pursuant to 42 U.S.C. Section 1983, plaintiff Donald M. Johnson filed this suit against Bob Odom, the Louisiana Commissioner of Agriculture; H. F. "Butch" Calhoun and John Impson (employees of the Department of Agriculture of the State of Louisiana); several members of the Louisiana Advisory Commission of Pesticides; and Dale Renicker, Sheriff of East Carroll Parish. Plaintiff alleges that defendants interfered with plaintiff's business as a crop duster by unlawfully gaining and presenting evidence against him at an adjudicatory hearing which resulted in the revocation of plaintiff's operator's license.

This suit was originally assigned to the Monroe Division of this district prior to its being transferred to this division. Before the transfer, defendants filed a motion for summary judgment

whereby defendants sought to dismiss the complaint for failure to state a claim upon which relief could be granted, improper venue, lack of subject matter jurisdiction, lack of personal jurisdiction, immunity, res judicata and prescription. In the previous ruling, the court declined to grant summary judgment in favor of defendants and held that they were not entitled to absolute immunity, and that although qualified immunity might apply, the plaintiff alleged facts asserting that defendants knew their actions were unconstitutional. The court also held the action had not prescribed and that jurisdiction was proper. Defendants now request that the court reconsider that decision. In urging reversal of the prior ruling, defendants assert that affidavits relating to defendants' action that were submitted by plaintiff were misleading and that through deposing the affiants, defendants have clarified that testimony.

The facts which form the basis of this suit are alleged to be as follows. Plaintiff alleges that he was approached on various occasions in 1980 and 1982 to provide monetary campaign contributions for Bob Odom, the Commissioner of Agriculture for the State of Louisiana. He alleges that he provided $ 150.00, but refused to pay the $500.00 requested. He alleges that because of such refusal he was subsequently charged with violating the Louisiana Pesticide Law. He asserts that the Louisiana Department of Agriculture encouraged perjured testimony to adjudicate plaintiff guilty of violating the Louisiana pesticide laws. He further alleges that defendants violated plaintiff's equal protection and due process rights by singling him out for prosecution and revocation of his license, and using evidence obtained against him unconstitutionally because of his failure to contribute to the campaign as requested. For the first motion for summary judgment, plaintiff submitted several affidavits to this effect.

Now, defendants suggest they have deposed the affiants and

clarified the statements. Defendants state the facts as follows. Defendants assert two sub-programs of the Louisiana Department of Agriculture are involved in this case, one which regulates aerial applicators and one which investigates damage complaints. Defendants allege that the problem which forms the basis of this suit occurred when the Department of Agriculture received two complaints involving plaintiff.

Defendants assert that the Department of Agriculture received a complaint from a farmer, Kenneth Frith, in June, 1980, that his crop was damaged by Phenoxy (245T) from aerial applications in nearby fields. Defendants assert that a newly appointed investigator, Tommy Shields, concluded that plaintiff and another had caused the damage, but other more experienced investigators determined Johnson alone caused the damage. Defendants assert that Shields' conclusion was rejected as being incorrect, and that although plaintiff asserts Shields was forced to change his story in regard to the Frith incident and commit perjury, that, in any event, no action taken against plaintiff was based on this incident.

Defendants next assert that in June, 1981, James Myers complained to the Department of crop damage by Phenoxy (245T). Defendants inform that Phenoxy (245T) is a regulated substance and may only be used with departmental permission. Defendants assert the department found Johnson caused the Myers' damage, although he had not gotten permission to use the substance. Defendants further assert that although plaintiff claims he received oral permission from Shields to use the substance, such is not the case. Defendants assert that the investigation of the second complaint, the Myers complaint, revealed violations of aerial regulations which set off the first of three adjudicatory hearings against the plaintiff which resulted in justifiable actions. The second complaint, according to defendants, involved plaintiff's spraying a chemical to kill birds, and the third com-

plaint involved plaintiff's spraying chemicals on departmental inspectors and hitting an inspector.

In their motion for summary judgment, defendants assert that defendants Odom and the Commission members are subject to absolute immunity as being a judicial body and that all defendants are at least subject to qualified immunity, for the depositions of the above mentioned affiants indicate that defendants were not unreasonable in taking actions against plaintiff. Defendants also assert that this action is barred by principles of res judicata and that the action has prescribed against all parties except Bob Odom.

On the other hand, plaintiff asserts the court's prior ruling is correct, that Odom and the Commission went beyond their mere decision-making role in a manner which would not entitle them to immunity and that prescription against all defendants was interrupted when suit was filed against one solidary obligor.

Analysis of Law and Facts

Pursuant to Rule 56(c), Fed.R.Civ.P., summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment always bears the initial burden of "informing the district court of the basis for its motion and identifying those portions of [documentation submitted in support of the motion] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Bordelon v. Block, 810 F.2d 468, 470 (5th Cir. 1986).

The mere existence of a disputed fact, however, will not alone

defeat a summary judgment motion. Rather, "the dispute must be genuine, and the facts must be material." Professional Mgrs. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986).

"Genuine disputes" are those by which the evidence is such that a reasonable jury could return a verdict for the non-movant. Anderson v. Liberty Lobby, --U.S.-- , 106 S.Ct. 2505, 2510 (1986). As to materiality, the substantive law will identify which facts are material and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. See also, St. Amant v. Benoit, 806 F.2d 1294, 1297 (5th Cir. 1987). The standard for granting summary judgment, therefore, is said to mirror the standard for directed verdicts under Rule 5O(a), Fed.R.Civ.P. Celotex Corp. v. Catrett, 106 S.Ct. at 2553, citing Anderson v. Liberty Lobby, 106 S.Ct. at 2512; see also, St. Amant v. Benoit, supra ("Consequently, in order to defeat a summary judgment motion, there must be evidence whose reasonable inferences support the non-moving party's position").

Hence, summary judgment turns on whether a proper jury question is presented. Anderson v. Liberty Lobby, 106 S.Ct. at 2510. Although the judge is not to weigh evidence or make credibility choices, Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987), he should determine the sufficiency of the evidence, and there is no rule that summary judgment must be denied just because a scintilla of evidence supports the non-movant. Anderson v. Liberty Lobby, 106 S.Ct. at 2511. Likewise, summary judgment should be granted if the evidence submitted by non-movant is merely colorable or not significantly probative. Id. See also, Professional Mgrs., 799 F.2d at 223 ("The question for the district court was not, however, whether advocacy would prevail despite insufficient evidence, but whether the

case should even be submitted to a jury or whether, if it were, a finding in the [non-movant's] favor could withstand a motion to set the verdict aside.") Nonetheless, any "inferences to be drawn from the underlying facts ... must be viewed in a light most favorable to the party opposing the motion." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986).

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita, 106 S.Ct. at 1356 (footnote omitted). If a non-moving party will have the burden of proof of an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since the complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial. Celotex Corp. v. Catrett, 106 S.Ct. at 2553.

The recent jurisprudence cited above makes clear that the trend in summary adjudication is to implement the fundamental policy of the Federal Rules of Civil Procedure: that is "... to secure the just, speedy, and inexpensive determination of every action." Rule 1, Fed.R.Civ.P.; Celotex Corp. v. Catrett, 106 S.Ct. at 2555 (citations omitted); Professional Mgrs., 799 F.2d at 222.

First, defendants assert immunity. They assert that Odom and the members of the Agriculture Commission are entitled to absolute immunity, and that all defendants are at least entitled to qualified immunity. For the absolute immunity position, defendants point out that the duties of the Commission are to make initial determinations on given matters, and that the Commissioner makes final determinations. Defendants therefore assert that Odom and

the Commission members were in a judicial role and are subject to absolute judicial immunity. For this positions, defendants cite the case of Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894 (1978).

In that case, the Supreme Court held that persons performing adjudicatory functions with the Federal Department of Agriculture were entitled to absolute immunity. The court based its decision on a number of considerations. Those considerations included that the work of an administrative law judge is functionally similar to the role of a judge; the process of agency adjudication is currently structured so as to assure the hearing examiner exercises independent judgment free from outside pressures or other officials' influence, where conducting a hearing, the examiner is not responsible or subject to the supervision or direction of employees or agents engaged in the performance of investigation or prosecution functions for the agency; the hearing officer may not consult any person or party including other agency officials, concerning a fact or issue in the hearing unless notice is given to all parties so they can participate; hearing examiners are assigned to cases in rotation so far as practicable; and they may be removed for good cause established and determined by the Civil Service Commission after a hearing. The Court stated that in light of those safeguards, such examiners would be entitled to absolute judicial immunity.

In this case, the defendants argue that Odom and the Commission are entitled to absolute immunity because they received investigative complaints, filed charges and held adjudicatory hearings. They also argue that without such immunity, they will be subject to retaliatory litigation. Plaintiff had adequate opportunity to challenge the constitutionality of the Commission's and Commissioner's actions by requesting judicial review.

Although the Commissioner of Agriculture and the Commission serve as a fact finding body, they do not assert that anything resembling the safeguards applicable to the hearing examiners with the Federal Department of Agriculture are in effect with the Louisiana Department of Agriculture. The undersigned therefore agrees with the previous court ruling to the effect that the Commissioner of Agriculture and the Agricultural Commission are not officers which embrace a function so sensitive as to require a total shield from liability as contemplated by the Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1967). Furthermore, the plaintiff in this case asserts that the Commission and Commissioner were engaged in activities which went beyond the decision-making process when they committed the alleged wrongs of which the plaintiff complains in this case.

Next, defendants argue that they are all entitled to qualified or good faith immunity. This grant of immunity depends on the reasonableness of the officials' acts which are the subject of this suit. In considering the grant of qualified immunity, the court must balance the right of state officials to be free from frivolous suits against the right of complainants to be fairly heard. Qualified immunity shields state officials from liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, supra. This doctrine allows state officials to carry out their duties free of fear that their every decision might be tried before a court of law. Yet, this important right must be considered with due regard to a complainant's right to have his day in court.

Herein, plaintiff asserts and several affiants have stated facts which indicate that the defendants knew or reasonably should have known that their acts would violate plaintiff's constitu-

tional rights. Defendants argue that the affiants have now been deposed and the affidavits are clarified, for defendants assert that plaintiff's counsel has created material issue of fact merely by craftily drafting the affidavits. Defendants assert that with the deposition testimony, it can be seen that defendants acted in good faith with "abundant probable cause" to situations in violation of Louisiana law in pursuit of fulfilling their official duties.

The plaintiff's affidavits indicate that the defendants sought perjured testimony against plaintiff for failing to contribute to the campaign, and sought to harm his business, all while acting as officials of the State of Louisiana. These allegations do create a dispute as to material facts for immunity purposes. Although defendants argue that they have clarified the affidavits, to conclude that such clarification overcomes the affidavits would be to weigh the evidence, and such action as mentioned above, would be inappropriate in considering a motion for summary judgment. Therefore, whether Odom, his staff, the Agricultural Commission, and the Sheriff of East Carroll Parish were acting in an unreasonable manner which violated plaintiff's due process rights remains a disputed factual issue. The affidavits plaintiff submitted for the first summary judgment do create a factual issue as to the propriety of the action of all the defendants involved and therefore should defeat summary judgment on the issue of immunity.

Next, defendants raise the defense of res judicata. Res judicata is a defense available under Louisiana law to bar a trial of a previously adjudicated matter. In order for res judicata to be applicable, three elements must be established:

(l) The identities of the parties must be the same;

(2) The identity of the cause must be the same; and

(3) The identity of the thing demanded must be the same in both cases.

Defendants assert that plaintiff's appeals of the adjudicatory decisions bar retrying this suit. Defendants allege that plaintiff had an opportunity to appeal the first hearing, notwithstanding the fact that he did not timely institute such appeal. In reference to the appeal of the second complaint, defendants assert that the First Circuit Court of Appeal for the State of Louisiana determined the Pesticide Control Act was not unconstitutionally vague and that the Department complied with all statutory guidelines in adjudicating plaintiff's conduct. Also, defendants assert that on appeal of the third adjudicatory hearing against plaintiff, it was determined that plaintiff violated the act and that his license was appropriately revoked.

In this case, plaintiff alleges that defendants acted to interfere with his business and to selectively prosecute him for failing to contribute to the Commissioner's campaign, by offering perjured testimony against him, and by questioning him without the aid of counsel.

Defendants cite the case of Hernandez v. City of Lafayette, 699 F.2d 734, for the proposition that this suit is res judicata in accordance with Louisiana law. In that action, the plaintiff had sought to enjoin the City of Lafayette from rezoning his property as violating his due process rights. Plaintiff contested the validity of the zoning ordinance as it applied to his land. He sought an injunction against the City in the state court and filed a 1983 action in federal court on the same due process grounds. The state action was resolved first by the court deciding that the plaintiff was not denied due process of law in the rezoning. Therefore, the

federal court held that the entire matter had previously been disputed. Although the demand in state court was for an injunction and in federal court was for damages, the court held that the same issues present in the 1983 action had been litigated in state court, that the parties were the same, and that res judicata barred the federal court suit.

In this action, plaintiff seeks to recover damages for defendants unconstitutionally obtaining evidence in prosecuting him, and for interfering in his business under color of state law. Defendants have indicated that the appeal of two of the state court proceedings involved irregularities of the adjudicatory proceedings. However, that action did not involve the individual defendants. The adjudicatory proceedings were brought by the State of Louisiana, and not the individual defendants. Although some of the same issues might be addressed in this suit as was addressed in the state court action, the State of Louisiana and Johnson were the parties in the adjudicatory hearings, in this case, defendants are sued individually. Thus, the identity of parties as required by Louisiana res judicata principles is not present and, therefore, the undersigned concludes the defense of res judicata is not applicable in this case.

Finally, defendants assert that as to all defendants except Bob Odom, this action has prescribed. As the court noted in the previous decision, the Louisiana one year prescription provision for delictual action applies to a 1983 claim. In considering the prescription issue, it is necessary to consider the alleged dates of the wrongful activity, and the dates on which previous suits regarding this matter were filed. The actions complained of herein on behalf of all defendants involved, allegedly occurred between the time periods of August 5, 1982 and November 26, 1984. It should be noted that Article 3462 of the Louisiana Civil Code provides that:

> "Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period."

Defendants allege that on April 4, 1983, plaintiff filed a petition in a Louisiana state court against Bob Odom, thus interrupting prescription as to this defendant. On July 26, 1984, the Commissioner of Agriculture and the Advisory Commission on Pesticides, in their official capacities, filed petition for a temporary restraining order against plaintiff in a Louisiana state court. On November 8, 1984, plaintiff filed an answer and reconventional demand in that action against Bob Odom, and on November 26, 1984 plaintiff filed a supplemental and amending answer and reconventional demand in that proceeding naming as defendants the individual members of the Advisory Commission of Pesticides who are named in this suit, namely, Jeff Calloway, Douglas Duty, Grady Coburn, Norvin Fagan, Robert Ewing, Jack Martin, John C. Moser, and Lucas Terracina. He also named John Impson and H.F. "Butch" Calhoun, staff members of the Department of Agriculture, in that action.

Although in the previous ruling, the court made a factual finding that Dale Renicker, Sheriff of East Carroll Parish, was also named as a defendant on November 26, 1984, defendants assert that Renicker was named for the first time when this suit was filed in this court on July 24, 1987. Defendants also assert that Thomas Cascio was not named as a defendant in any suit prior to this suit in this court. In relation to the first suit which was filed on April 4, 1983 by the Commissioner of Agriculture, the plaintiff dismissed his reconventional demand in that action on January 25,

1985. One should note that Article 3463 of the Louisiana Civil Code states:

> "An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if theplaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at the trial."

In this case, although plaintiff voluntarily dismissed the first suit, prior to dismissing that suit the reconventional demand of November 26, 1984 was filed.

As noted by the previous court's ruling, under the rule of Levy v. Stelly 277 50.2d 194 (La.4th Cir. 1973), writ denied, 279 50.2d 203 (La. 1973), when a second suit is filed on the same cause of action prior to abandonment, voluntary dismissal, or failure to prosecute the original suit, the interruption provided by the first suit is still viable at the time of the filing of the second suit, and the interruption remains viable after the dismissal because of the pendency of the second suit. Therefore, although plaintiff voluntarily dismissed his first reconventional demand, that voluntary dismissal did not nullify the interruption of prescription caused by filing the first reconventional demand, for he filed his second suit prior to dismissal of the first suit.

Next it should be noted that the second reconventional demand was dismissed without prejudice by the Court of Appeal on August 20, 1986. That suit being dismissed by a Louisiana state court without prejudice, and having interrupted prescription, gave plaintiff one year after the dismissal to file another suit on the same factual grounds. See Borne v. La Terre Company, 222

F.2d 453 (5th Cir. 1955), and LSA-C.C. Art. 3463 which states that prescription is interrupted as long as the suit is pending. This suit was filed on July 24, 1987, clearly within one year of the dismissal of plaintiff's second reconventional demand. Defendant asserts that prescription was only interrupted against Bob Odom because of the first suit being filed within one year of the alleged wrongs. Defendants assert that because none of the other defendants were sued within a year of the alleged wrongs, that the actions against them have prescribed. However, Article 1799 of the Louisiana Civil Code states:

> "The interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs."

In this action, plaintiff asserts that defendants acted together to violate plaintiff's constitutional rights, and therefore, that they are solidary obligors. In accordance with Article 1799, the interruption of prescription as to one of the obligors would consequently interrupt prescription as to all. In this case, defendants admit that prescription is interrupted at least as to Bob Odom for demands were filed against him within one year after the alleged wrongs occurred. Defendants have not shown that prescription was not interrupted at any time when the defendants other than Bob Odom were named as defendants, and the record of this case indicates that after suit was timely filed against Bob Odom, that prescription remained interrupted against any and all other solidary obligors. Therefore, defendants have not shown that this suit is barred by the Louisiana prescription principles applicable to this case.

For the foregoing reasons, it is recommended that the court deny defendants' motion for summary judgment and motion to reconsider.

Under the provisions of 28 U.S.C. Section 636(b)(1)(C), failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of service can result in the waiver of a de novo district court review.

THUS DONE AND SIGNED, in Chambers, at Lake Charles, Louisiana, on this 31st day of October, 1989.

/SIGNED/
JAMES T. TRIMBLE, JR.
UNITED STATES MAGISTRATE

E-1

# IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA MONROE DIVISION

CIVIL ACTION NO.87-1553

**DONALD M. JOHNSON**

versus

**LOUISIANA DEPARTMENT OF AGRICULTURE, ET AL.**

FEBRUARY 6, 1989

MEMORANDUM RULING

Pending for determination is a motion for summary judgment of defendants pursuant to Fed.R.Civ.P. 56[1]. Defendants argue that plaintiff Donald M. Johnson's ("Johnson") claim against them should be dismissed as it fails to state a cause of action under 42 U.S.C. § 1983 or § 1985, and alternatively, that the claim has prescribed or venue is improper. Plaintiff opposes, filing affidavits which allege numerous abusive actions in violation of 42 U.S.C. § 1983 by the Louisiana Commissioner of Agriculture and Forestry, Bob Odom, members of his staff, and members of the Louisiana Advisory Commission on Pesticides. Plaintiff also argues that his 1983 claim has not prescribed and venue in

---

[1] Defendants initially brought a motion to dismiss pursuant to Fed.R.Civ.P. 12(b). As this motion presented matters outside the pleadings for the Court to consider, the motion is treated as one for summary judgment under this same rule.

this Court is proper[2]. For reasons stated below, defendants' motion is granted in part and denied in part.

This action arises out of the investigation, adjudicatory hearings, decisions, and the enforcement activities of Odom, his staff, and members of the Louisiana Advisory Commission on Pesticides. Plaintiff claims that these defendants, along with Dale Rinicker, Sheriff of East Carroll Parish, Louisiana, violated his civil rights by interfering with his business activities and attempting to unlawfully gain evidence against the plaintiff which would be used against him at the adjudicatory hearings. Johnson has sued the defendants individually and in their official capacity.

Initially, it should be noted that venue in this Court is proper under 28 U.S.C. § 1391(b) and § 1392(a) and Fed.R.Civ.P. 20. Title 28 U.S.C. § 1391(b) provides that

> "A civil action which jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law."

Title 28 U.S.C. § 1392(a) provides:

> "Any civil action, not of a local[3] nature, against defendants residing in different districts in the same state, may be brought in any of such districts."

---

[2] Plaintiff has abandoned his § 1985 claim.

[3] The word "local" within the meaning of this statute refers to actions involving property and not to the district in which the facts giving rise to the complaint occur. Johnson v. Jumelle, 64 F.R.D. 708 (1974).

Fed. R. Civ. P. 20, among other things, provides:

> "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative,any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or factcommon to all of them will arise in the action."

In view of Rule 20 and the venue statutes, it seems clear that venue in the Western District of Louisiana is proper. Defendants Calloway, Duty, Coburn, Moser, Terracina, Cascio, and Rinicker are proper party defendants and reside in the Western District. Defendants claim that venue is improper is unjustified[4].

Next, defendants claim that plaintiff s cause of action has prescribed and must be examined. Because no federal statute of limitations relating to civil rights actions applies to suits under 42 U.S.C. § 1981, et seq., federal courts must apply the most appropriate period supplied by the law of the state in which the federal court sits. Ford v. Stone, 599 F.Supp. 693 (M.D. La. 1984) citing Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 179, 64 L.Ed.2d 440 (1980). Tolling or interruption of an applicable state statute of limitations is also a question of state law. Id.

Louisiana Civil Code Article 3492 provides a prescriptive period of one year for delictual actions brought under Louisiana Civil Code Article 2315, the general tort article. This is the most

---

4 The fact that the defendants are also state officials does not alter the determination of venue under § 1392(a). Under Heard v. Quachita Parish School Board, 94 F.Supp. 897 (W.D. La. 1951), this statute applied to state officials as well as to private individuals who live in different districts within the same state.

analogous type of cause of action to a suit under 42 U.S.C. 1983. Ford, 599 F.Supp. at 695, citing Jones v. Orleans Parish School Board, 688 F.2d 342 (5th Cir. 1982). Therefore, Johnson had one year from the accrual of his federal cause of action, absent interruption or tolling of the prescriptive period to bring suit.

Louisiana Civil Code Articles 3462 and 3463 provide for interrupting of prescription under certain circumstances. Article 3462 provides:

> "Prescription is interrupted when the owner commences action against the possessor, or when the obligee commences action against the obligor, in a court of competent jurisdiction and venue. If action is commenced in an incompetent court, or in an improper venue, prescription is interrupted only as to a defendant served by process within the prescriptive period."

Article 463 states:

> "An interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending. Interruption is considered never to have occurred if the plaintiff abandons, voluntarily dismisses, or fails to prosecute the suit at the trial."

Under the rule of Levy v. Stelly, 277 So.2d 194, 196 (La. App. 4th Cir. 1973), writ denied, 279 50.2d 203 (La. 1973), when a second suit is filed on the same cause of action prior the abandonment, voluntary dismissal, or failure to prosecute the original demand, the interruption provided by the first suit is still viable at the time of the filing of the second suit, and the

interruption remains viable after the dismissal because of the pendency of the second suit. Also, under Louisiana law once prescription is interrupted, liberative prescription is generally not extinguished for all time; a new statutory period begins to run. For example, if the prescriptive period is one year from the date of the incident, and it is interrupted after two months have run, the statutory bar will go into effect fourteen months after the date of the incident. Holden v. Placid Oil Company, 494 F. Supp. 292, 296 (E.D. La. 1980), citing Spring v. Barr, 9 La. App. 732, 120 So.2d 256 (La. App. 1st Cir. 1929).

Plaintiff timely filed his original suit (No. 265, 610 B) in East Baton Rouge Parish in the Nineteenth Judicial District on April 4, 1983. In his petition, he alleged both violations of Louisiana law and of federal law, namely 42 U.S.C. §1983. Later, in November, 1984, while the first suit was still viable, he filed a reconventional demand in suit number 14,217, which was a pending suit filed by the defendants in East Carroll Parish in the Sixth Judicial District. This demand alleged the same causes of Action as set forth in suit number 265,610 B; however, it added Sheriff Rinicker as a defendant[5]. Plaintiff voluntarily dismissed

---

[5] Defendants claim that plaintiff's reconventional demand alleges only state causes of action and no federal causes of action. Nevertheless a careful review of the reconventional demand reveals that federal causes of action are also asserted. For example, in the demand plaintiff specifically claims that due to the defendant's conduct his Fifth Amendment rights have been violated along with his right to due process. Although the Louisiana Constitution, Art. 1§ 2 protects the citizens of Louisiana against deprivations of life, liberty or property without due process, it appears that the plaintiff is also asserting his federal constituional rights. See plaintiff's answer and reconventional demand, paragraphs 17 and 18. Moreover, the Louisiana Constitution has no Fifth Amendment proper. This Court also finds that the claim against defendant Rinicker was timely filed. Plaintiff's original action, without interruption, would

suit number 265,610 B in January, 1985, two months after the filing of his second suit. Suit number 14,217 was later dismissed by the Second Circuit Court of Appeals on August 20, 1986[6].

Following Levy, since plaintiff's reconventional demand in suit number 14,217 was filed prior to his voluntary dismissal of his original demand, interruption remained intact because of the pendency of the second suit. The Court of Appeals dismissed the second suit on August 20, 1986; hence, the plaintiff had until August 20, 1987, to file the present suit. His filing of this suit, which alleges the same causes of action under §1983 and state law as seen in the two previous suits, occurred on July 4, 1987, and was timely[7].

Next, Johnson's claim against the Department of Agriculture must fall in light of the Eleventh Amendment This amendment prohibits the exercise of federal jurisdiction when one of the United States is sued by a citizen of a foreign state or one of the state's own citizens. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504,

---

have expired at the latest on December 21, 1983. However, since prescription was first interrupted by the filing of suit number 265,610 B in April, 1983, and later interrupted by the filing of the reconventional demand in suit number 14,217, the claim against Rinicker in this demand was timely.

[6] The Second Circuit did not reach the merits of plaintiff's civil rights claims. Instead, the court dismissed his claim due to his lack of standing to bring the reconventional demand. See Commissioner of Agriculture v. Transylvania Flying Service, 493 So.2d 744, 747-49 (La. App. 2nd Cir. 1986).

[7] This Court also notes that federal jurisdiction of § 1983 claims is concurrent with that of state courts. Ford v. Stone, 599 F.Supp. 693, 695 (M.D. La. 1984). Assertions of federal claims in state actions clearly constitutes an interruption of prescription. Id.

33 L.Ed. 842 (1890). The amendment prohibits an award of an accrued monetary liability which must be met from general revenues of the state absent consent or waiver of the state of its Eleventh Amendment immunity. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Louisiana has not waived its immunity in a circumstance such as is present here[8]. Johnson is claiming monetary damages from Louisiana based on the actions of its officials. Johnson's claim against the Department of Agriculture is dismissed.

Johnson's §1983 claim, however, presents a possible meritorious action. Although the defendants claim that they are entitled to absolute[9] or qualified immunity, the plaintiff has produced

---

[8] LSA R.S. 13:1506(A) provides: "No suit against the state, or a state agency, or a political subdivision shall be instituted in any court other than a Louisiana State Court.

[9] This Court finds that the defendants are not entitled to absolute immunity. Odom, the members of the ACP, and Rinicker do not hold offices which demand such protection. In order for an official to be entitled to absolute immunity, he must show (1) that the responsibility of his office embraces a function so sensitive as to require a total shield from liability; and (2) that he was discharging the protected function when performing the act for which liability is asserted. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 2735, 73 L.Ed.2d 396 (1962). Here, the job duties of the defendants are not so sensitive as to require a total shield from liability. However, these defendants may be entitled to good-faith or qualified immunity. Johnson has alleged, and through affidavits has produced, evidence which may also defeat this defense. Qualified immunity may be defeated if a plaintiff shows that an official knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the plaintiff or if the official took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. Id. at 102 S.Ct. 2737.

sufficient evidence to show that his §1983 claim should not be dismissed. Johnson appears to bring this claim under the substantial and procedural due process provisions of the Fourteenth Amendment and under the First, Fourth, and Fifth Amendments. The substantive rights enumerated in these three amendments are applied to the states through the due process clause of the Fourteenth Amendment. The affidavits of Frederick C. White, William W. Head, Jr., Jimmy Muse, Jack Ray, Jerry Doles, William D. Batey, Shirley Fortenberry, Clint Fortenberry, and Bobby Dale Johnson and the deposition of Barby Carrol produced by the plaintiff show that genuine issues of material fact exist[10]. Therefore, defendants' motion for summary judgment may not be granted as it pertains to this claim.

Defendants' motion for summary judgment is granted in that plaintiff's §1985 claim is dismissed, and all claims against the Department of Agriculture are dismissed. Defendants' motion is denied in that plaintiff's §1983 claim against them is not dismissed. Defendants' motion for oral argument is also denied.

THUS DONE AND SIGNED at Monroe, Louisiana, this 6 day of February, 1989.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

---

[10] Summary judgment may be granted if the moving party shows "from pleadings, depositions, admissions and affidavits, considered in the light most favorable to plaintiff, that there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of fact and that [it] is entitled to judgment as a matter of law." United States v. An Article of Drug Consisting of 4,680 Pails 725 F.2d 976, 984 (5th Cir. 1984)

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA MONROE DIVISION**

CIVIL ACTION NO.
87-1553

**DONALD M. JOHNSON**
versus

**LOUISIANA DEPARTMENT OF AGRICULTURE, ET AL.**

FEBRUARY 6, 1989

ORDER

Pursuant to the foregoing Memorandum Ruling,

IT IS ORDERED that defendants' motion for summary judgment is granted in that plaintiff's §1985 claim is dismissed and all claims against the Department of Agriculture are dismissed;

IT IS FURTHER ORDERED that defendant's motion is denied in that plaintiff's §1983 claim against them is not dismissed; and

IT IS FURTHER ORDERED that defendants' motion for oral argument is also denied.

THUS DONE AND SIGNED at Monroe, Louisiana, this 6th day of February, 1989.

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

# LOUISIANA REVISED STATUTES 3:3211-3214

## LOUISIANA ADVISORY COMMISSION ON PESTICIDES

### §3211. Louisiana Advisory Commission on Pesticides

A. The Louisiana Advisory Commission on Pesticides is hereby created within the Department of Agriculture. The Commission shall be domiciled in Baton Rouge.

B. The commission shall consist of the following nine members appointed by the commissioner in accordance with the following provisions:

(1) One aerial applicator who is a commercial applicator appointed from a list of three persons nominated by the Louisiana Agricultural Aviation Association.

(2) One ground applicator who is a commercial applicator appointed from a list of three persons nominated by the Louisiana Pesticide Applicators Association.

(3) One chemical representative appointed from a list of three persons nominated by the Louisiana Pesticide Applicators Association.

(4) One agricultural consultant appointed from a list of three persons nominated by the Louisiana Agricultural Consultants' Association.

(5) One pesticide salesperson appointed from the state at large.

(6) One person appointed from a list of three persons nominated by the Louisiana Farm Bureau Federation.

(7) One farmer who is a private applicator appointed from a list of three persons nominated by the Louisiana Mosquito Control Association.

(8) One farmer who is a private applicator appointed from the state at large.

(9) One person appointed from a list of three persons nominated by the Louisiana Wildlife Federation.

Each appointment by the commissioner shall be submitted to the Senate for confirmation, and beginning in 1984 every appointment confirmed by the Senate shall again be submitted by the commissioner to the Senate for confirmation every two years after the initial confirmation.

C. Members shall be appointed for terms which shall end at the same time as the term of the commissioner making the appointment. Members shall serve until their successors in office are appointed and sworn into office.

D. Vacancies in the offices of the members shall be filled in the same manner as the original appointments for the unexpired portion of the term of the office vacated.

E. A majority of the members of the commission shall constitute a quorum for the transaction of business. All official actions of the commission shall require the affirmative vote of a majority of the members of the commission.

F. The commissioner may appoint an alternate member for each member. If the member is appointed from a list of nominees, the alternate member shall be appointed from the same list. If the member cannot attend a meeting, the alternate member may serve as the member's representative if the member notifies the commissioner that he is unable to attend and that he wishes the alternate member to serve as his representative. Alternate members who serve as the representative of a member shall have voting rights.

G. The commission, by a vote of two-thirds of the members, may expel a member who has accumulated three consecutive unexcused absences from commission meetings.

H. Members of the commission shall not receive any salary for their duties as members. Members or representatives may receive a per diem for each day spent in actual attendance or meetings of the commission or of duly appointed committees or subcommittees of the commission. The amount of the per diem shall be fixed by the commission in an amount not to exceed forty dollars. Members or representatives may receive a mileage allowance for mileage traveled in attending meetings. The mileage allowance shall be fixed by the commission in an amount not to exceed the mileage rate for state employees.

I. The commission shall meet quarterly and may meet on the call of the chairman or upon the request of any three members. The commission shall not meet more than twelve times in any calendar year.

**§3212. Officers and employees**

A. The members of the commission shall elect a chairman, a vice chairman, and such other officers as they deem necessary. All

officers shall be members of the commission.

B. The commission shall employ a director and an assistant director, who shall be appointed by the commission subject to the approval of the commissioner of agriculture. The director and assistant director shall be in the unclassified service. The commissioner may employ such other personnel of the commission as he deems appropriate. All employees of the commission,shall be under the direction and supervision of the commissioner.

**§3213. Powers**

The commission shall have the following powers:

(l) To advise the commissioner on the adoption of such rules and regulations as are necessary to enforce the provisions of this Chapter.

(2) To hold hearings and conduct investigations.

(3) To advise the commissioner on the qualifications for licenses, certificates, and permits required to sell or apply pesticides, to engage in business as an agricultural consultant, or to dispose of pesticide wastes.

(4) To advise the commissioner on the requirements for the registration of pesticides.

(5) To hold hearings on alleged violations of the provisions of this Chapter or of the rules and regulations adopted under the provisions of this Chapter.

(6) To advise the commissioner on the civil penalties to be imposed or the injunctive relief to be sought to punish and

restrain violations of the provisions of this Chapter or of the rules and regulations adopted under the provisions of this Chapter.

(7) To recommend that the commissioner suspend or revoke licenses, certificates, and permits or impose probation on holders of licenses, certificates, or permits.

(8) To work jointly with the Department of Health and Human Resources to establish and develop a state mosquito control program.

(9) To adopt bylaws for the orderly management of the affairs of the commission.

(10) To employ a director and assistant director, subject to the approval of the commissioner.

**§3214. Adjudicatory hearings**

All adjudicatory hearings held by the commission shall be conducted in accordance with the following provisions:

(l) The commissioner shall convene the commission for the purpose of hearing the matter.

(2) The commissioner shall appoint a hearing officer, who shall preside over the hearing.

(3) The commissioner may issue subpoenas to compel the attendance of witnesses or the production of documents and records anywhere in the state in any hearing before the commission.

(4) The hearing shall be conducted in accordance with the

provisions of the Administrative Procedure Act.

(5) The commission shall make an initial determination on the matter. This determination shall be submitted to the commissioner in writing.

(6) The commissioner shall make the final determination on the matter. If he determination of the commissioner differs from the determination of the commission, the commissioner shall issue a written opinion based on the record of the hearing.

(7) Except as otherwise provided in this Paragraph, appeals from rulings of he commissioner shall be taken in accordance with the provisions of the Administrative Procedure Act. Notwithstanding the provisions of R.S. 9:964(B), any appeal from a determination of the commissioner, when filed forma pauperis, shall be by civil proceedings in the district court for the parish in which the violation occurred.

# LOUISIANA LEGISLATURE, 1980

## ACT No 330

Senate Bill No. 121

AN ACT

Be it enacted by the Legislature of Louisiana:

Section 1. Sections 733, 1631, and 2092, all of Title 3 of the Louisiana Revised Statutes of 1950, are hereby amended and reenacted, and Subsection D of Section 3032 of said Title is hereby enacted, all to read as follows:

* * *

1631. Advisory commission; members

A. The commissioner of agriculture shall appoint an advisory committee to be known as the Advisory Commission on Pesticides, herein referred to as the commission. The commission shall advise and make recommendations to the commissioner for the regulation and control of all aspects of the pesticide industry and related fields. The commission shall consist of seventeen members selected by the commissioner as follows:

(l) Two certified aerial applicators appointed from a list of four submitted by the Louisiana Agricultural Aviation Association.

(2) Two certified ground applicators appointed from a list of four submitted by the Louisiana Pesticide Applicators Association.

(3) Four farmers, certified as private applicators, representing

the four major commodities in Louisiana, cotton, rice, soybeans, and sugarcane, appointed from a list of eight submitted by the Louisiana Farm Bureau, consisting of two representatives from each of the four commodities.

(4) Two chemical representatives appointed from a list of four submitted by the Louisiana Agricultural Chemical Association.

(5) Two certified pest management consultants appointed from a list of four submitted by the Louisiana Agricultural Chemical Association.

(6) Two certified pesticide dealers appointed from a list of four submitted by the Louisiana Seedman's Association.

(7) One certified aerial applicator who is a nonmember of the Louisiana Agricultural Aviation Association, chosen from a list of licensed aerial applicators.

(8) One member selected from a list of two submitted by the Louisiana Shrimp Association.

(9) One member selected from a list of two submitted by the Louisiana Cotton Producers Association.

B. The initial commission members shall serve terms as follows: four shall serve for one year, four shall serve for two years, four shall serve for three years, five shall serve for four years; all of said initial terms to be allocated on a random basis. Thereafter, members shall be appointed for four-year terms. Members may serve more than one term.

C. A majority of the members of the commission shall constitute a quorum for the transaction of all business and the carrying out of duties of the commission. Each member shall take and subscribe to the oath of office prescribed for state officers. No member of the commission shall receive any salary, but for each day spent in actual attendance of meetings of the commission, or of meetings of duly appointed committees or subcommittees thereof, each appointed member, other than state employees, may receive a per diem in such amount as set by the commission, but not to exceed forty dollars, and may receive an allowance for mileage in attending the meetings but not to exceed the rate allowed state employees for mileage.

* * *

# LOUISIANA LEGISLATURE, 1975

## ACT No. 779

House Bill No. 1631.

***

Be it enacted by the Legislature of Louisiana:

Section 1. Subpart B of Part 1 of Chapter 12 of Title 3 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to consist of Sections 1621 through 1642, both inclusive, and to read as follows:

SUBPART B. PESTICIDE CONTROL ACT

**§1631. Advisory commission; members**

The commissioner of agriculture shall appoint an advisory committee to be known as the Advisory Commission on Pesticides, herein referred to as the commission. The commission shall advise and make recommendations to the commissioner for the regulation and control of all aspects of the pesticide industry and related fields. The commission shall consist of seventeen members selected by the commissioner as follows:

(1) Two certified aerial applicators appointed from a list of four submitted by the Louisiana Agricultural Aviation Association.

(2) Two certified ground applicators appointed from a list of four submitted by the Louisiana Pesticide Applicators Association.

(3)Four farmers,certified as private applicators, representing the four major commodities in Louisiana, cotton, rice, soybeans and sugarcane, appointed from a list of eight submitted by the Louisiana Farm Bureau, consisting of two representatives from each of the four commodities.

(4) Two chemical representatives appointed from a list of four submitted by the Louisiana Agricultural Chemical Association.

(5) Two certified pest management consultants appointed from a list of four submitted by the Louisiana Agricultural Consultants Association.

(6) Two certified pesticide dealers appointed from a list of four submitted by the Louisiana Seedman's Association.

(7) One certified aerial applicator who is a non-member of the Louisiana Agricultural Aviation Association, chosen from a list of licensed aerial applicators.

(8) One member selected from a list of two submitted by the Louisiana Shrimp Association.

(9) One member selected from a list of two submitted by the Louisiana Cotton Producers Association.The initial commission members shall serve terms as follows: four shall serve for one year, four shall serve for two years, four shall serve for three years, five shall serve for four years; all of said initial terms to be allocated on a random basis. Thereafter, members shall be appointed for four year terms. Members may serve more than one-term.

**§1632. Duties of the commission**

The commission shall:

(1) Advise the commissioner on matters concerning the examination and qualification of all categories of certification and licensing;

(2) Advise the commissioner in the pursuit of any complaint or the bringing of any action for the purpose of enforcing the provisions of this Subpart or any rules and regulations adopted pursuant thereto;

(3) Participate in public hearings for persons accused of a violation-of this Subpart or rules and regulations promulgated thereunder; and

(4) Adopt bylaws for the orderly management of the affairs of the commission, which shall include provisions for the designation of proxies in the event a commission member is unable to attend a duly scheduled nonadjudicatory advisory meeting.

**§1633. Administrative hearing; notice; recommendations; penalties; appeal**

A. Any license or certification issued under the authority of this Subpart, may be denied, suspended, cancelled, or revoked or any person fined up to five hundred dollars by the commissioner upon the recommendation of the commission after a public hearing has been held at which the person charged with a violation has had an adequate opportunity to present a defense to the charge or charges made against him. If the commissioner's final action on the complaint differs from that recommended by

the commission, he must issue a written opinion based on the record of the hearing.

B. The charge or charges shall be heard by the members of the commission. Notice of the hearing shall be given by certified or registered mail at least fifteen days prior to the date of the hearing.

C. The advisory commission shall make a final recommendation in writing based on the record to the commissioner for his action. The violator may appear before the commissioner to appeal the action of the commission.

D. The violator may appeal the decision of the commissioner to a court of proper jurisdiction.

E. Any license or certification suspended, cancelled, or revoked under this Subpart may be reinstated upon appeal to the commissioner and approval by the commission.

# EXCERPTS FROM THE LOUISIANA ADMINISTRATIVE PROCEDURE ACT LA R.S. 49:950, ET. SEQ.

## §955. Adjudication; notice; hearing; records

A. In an adjudication, all parties who do not waive their rights shall be afforded an opportunity for hearing after reasonable notice.

B. The notice shall include:

(l) A statement of the time, place, and nature of the hearing;
(2) A statement of the legal authority and jurisdiction under which the hearing is to be held;
(3) A reference to the particular sections of the statutes and rules involved;
(4) A short and plain statement of the matters asserted.
If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished.

C. Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

D. Unless precluded by law, informal disposition may be made of any case of adjudication by stipulation, agreed settlement, consent order, or default.

E. The record in a case of adjudication shall include:

(1) All pleadings, motions, intermediate rulings;
(2) Evidence received or considered or a resume thereof if not transcribed;
(3) A statement of matters officially noticed except matters so obvious that statement of them would serve no useful purpose;
(4) Offers of proof, objections, and rulings thereon;
(5) Proposed findings and exceptions;
(6) Any decision, opinion, or report by the officer presiding at the hearing.

F. The agency shall make a full transcript of all proceedings before it when the statute governing it requires it, and, in the absence of such requirement, shall, at the request of any party or person, have prepared and furnish him with a copy of the transcript or any part thereof upon payment of the cost thereof unless the governing statute or constitution provides that it shall be furnished without cost.

G. Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

**§956. Rules of evidence; official notice; oaths and affirmations; subpoenas; depositions and discovery; and confidential privileged information**

In adjudication proceedings:

(1) Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. Agencies may exclude incompetent, irrelevant, immaterial, and unduly repeti-

tious evidence. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference. In case of incorporation by reference, the materials so incorporated shall be available for examination by the parties before being received in evidence.

(3) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

(4) Any agency or its subordinate presiding officer conducting a proceeding subject to this Chapter shall have the power to administer oaths and affirmations, regulate the course of the hearings, set the time and place for continued hearings, fix the time for filing of briefs and other documents, and direct the parties to appear and confer to consider the simplification of the issues.

(5) Any agency or its subordinate presiding officer shall have power to sign and issue subpoenas in the name of the agency requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence. No subpoena shall be issued until the party who wishes to subpoena the witness first deposits with the agency a sum of

money sufficient to pay all fees and expenses to which a witness in a civil case is entitled pursuant to R.S. 13:3661 and R.S. 13:3671. Witnesses subpoenaed to testify before an agency only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof, shall receive such additional compensation from the party who wishes to subpoena such witness as may be fixed by the agency with reference to the value of the time employed and the degree of learning or skill required. Whenever any person summoned under, this Section neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the agency may apply to the judge of the district court for the district within which the person so summoned resides or is found, for an attachment against him as for a contempt. It shall be the duty of the judge to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him, to proceed to a hearing of the case; and upon such hearing, the judge shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience[1].

(6) The agency or a subordinate presiding officer or any party to a proceeding before it may take the depositions of witnesses, within or without the state, in the same manner as provided by law for the taking of depositions in civil actions in courts of record. Depositions so taken shall be admissible in any proceed-

---

[1] R.S. 49:956(5) was amended in 1989, subsequent to the events at issue. The earlier version, which was effective at the time of the events in question, is reprinted above.

ing affected by this Chapter. The admission of such depositions may be objected to at the time of hearing and may be received in evidence or excluded from the evidence by the agency or presiding officer in accordance with the rules of evidence provided in this Chapter.

(7) An agency having power to conduct adjudication proceedings in accordance with this Chapter may adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings.

(8) Records and documents, in the possession of any agency or of any officer or employee thereof including any written conclusions drawn therefrom, which are deemed confidential and privileged shall not be made available for adjudication proceedings of that agency and shall not be subject to subpoena by any person or other state or federal agency.

Such records or documents shall only include any private contracts, geological and geophysical information and data, trade secrets and commercial or financial data, which are obtained by an agency through a voluntary agreement between the agency and any person, which said records and documents are designated as confidential and privileged by the parties when obtained, or records and documents which are specifically exempt from disclosure by statute. Any violation of this prohibition shall be a waiver of governmental immunity from suit for damage resulting from any such disclosure.

## §957. Examination of evidence by agency

When in an adjudication proceeding a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, or the proposed order is not prepared by a member of the agency, the decision, if adverse to a party to the

proceeding other than the agency itself, shall not be made final until a proposed order is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposed order shall be accompanied by a statement of the reasons therefor and of the disposition of each issue of fact or law necessary to the proposed order, prepared by the person who conducted the hearing or by one who has read the record. No sanction shall be imposed or order be issued except upon consideration of the whole record and as supported by and in accordance with the reliable, probative, and substantial evidence. The parties by written stipulation may waive, and the agency in the event there is no contest may eliminate, Compliance with this Section.

**§958. Decisions and orders**

A final decision or order adverse to a party in an adjudication proceeding shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record. The parties by written stipulation may waive, and the agency in the event there is no contest may eliminate, compliance with this Section.

## §959. Rehearings

A. A decision or order in a case of adjudication shall be subject to rehearing, reopening, or reconsideration by the agency, within ten days from the date of its entry. The grounds for such action shall be either that:

(1) The decision or order is clearly contrary to the law and the evidence;
(2) The party has discovered since the hearing evidence important to the issues which he could not have with due diligence obtained before or during the hearing;
(3) There is a showing that issues not previously considered ought to be examined in order properly to dispose of the matter; or
(4) There is other good ground for further consideration of the issues and the evidence in the public interest.

B. The petition of a party for rehearing, reconsideration, or review, and the order of the agency granting it, shall set forth the grounds which justify such action. Nothing in this Section shall prevent rehearing, reopening or reconsideration of a matter by any agency in accordance with other statutory provisions applicable to such agency, or, at any time, on the ground of fraud practiced by the prevailing party or of procurement of the order by perjured testimony or fictitious evidence. On reconsideration, reopening, or rehearing, the matter may be heard by the agency, or it may be referred to a subordinate deciding officer. The hearing shall be confined to those grounds upon which the reconsideration, reopening, or rehearing was ordered. If an application for rehearing shall be timely filed, the period within which judicial review, under the applicable statute, must be sought, shall run from the final disposition of such application.

## §960. Ex parte consultations and recusations

A. Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a case of adjudication noticed and docketed for hearing shall not communicate, directly or indirectly, in connection with any issue of fact or law, with any party or his representative, or with any officer, employee, or agent engaged in the performance of investigative, prosecuting, or advocating functions, except upon notice and opportunity for all parties to participate.

B. A subordinate deciding officer or agency member shall withdraw from any adjudicative proceeding in which he cannot accord a fair and impartial hearing or consideration. Any party may request the disqualification of a subordinate deciding officer or agency member, on the ground of his inability to give a fair and impartial hearing, by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which it is claimed that a fair and impartial hearing cannot be accorded. The issue shall be determined promptly by the agency, or, if it affects a member or members of the agency, by the remaining members thereof, if a quorum. Upon the entry of an order of disqualification affecting a subordinate deciding officer, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding. In further action, after the disqualification of a member of an agency, the provisions of R.S. 49:957 shall apply.

## §961. Licenses

A. When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Chapter concerning adjudication shall apply.

B. When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license shall not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

C. No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

## §964. Judicial review of adjudication

A. A person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review under this Chapter whether or not he has applied to the agency for rehearing, without limiting, however, utilization of or the scope of judicial review available under other means of

review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy and would inflict irreparable injury.

B. Proceedings for review may be instituted by filing a petition in the district court of the parish in which the agency is located within thirty days after mailing of notice of the final decision by the agency or, if a rehearing is requested, within thirty days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

C. The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

D. Within thirty days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

E. If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and

decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

F. The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

G. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(l) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(6) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. In the application of the rule, where the agency has the opportunity to judge of the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

**§965. Appeals**

An aggrieved party may obtain a review of any final judgment of the district court by appeal to the appropriate circuit court of appeal. The appeal shall be taken as in other civil cases.

## §967. Exemptions from provisions of Chapter

A. Chapter 13 of Title 49 of the Louisiana Revised Statutes of 1950 shall not be applicable to the Board of Tax Appeals, the Department of Revenue and Taxation, with the exception of the Louisiana Tax Commission that shall continue to be governed by this Chapter in its entirety, unless otherwise specifically provided by law, and the office of employment security; however, the provisions of R.S. 49:951(2), (4), (5), (6), and (7), 952, 953, 954, 954.1, 968, 969, and 970 shall be applicable to such board, department, and office.

B. The provisions of R.S. 49:968(F)(4)[1] and 970 shall not be applicable to any rule promulgated by the State Civil Service Commission or the Public Service Commission.

C. The provisions of R.S. 49:963, 964, and 965 shall not be applicable to any rule, regulation, or order of any agency subject to a right of review under the provisions of R.S. 30:12.

D. The provisions of R.S. 49:968 shall not apply to any rule or regulation promulgated by the Department of Wildlife and Fisheries or the Wildlife and Fisheries Commission relative to hunting seasons, trapping seasons, alligator seasons, shrimp seasons, oyster seasons, finfish seasons and size limits and all rules and regulations pursuant thereto. The Department of Wildlife and Fisheries and the Wildlife and Fisheries Commission may employ the provisions of R.S. 49:953(B) in promulgating rules and regulations relative to hunting seasons, trapping seasons, alligator seasons, shrimp seasons, oyster seasons, and finfish seasons and size limits and all rules and regulations pursuant thereto.

[1] In subsec. B, "R.S. 49:968(F)(4)" is as it appears in the enrolled act.

Supreme Court, U.S.
FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-782

In The

# Supreme Court of the United States

October Term, 1990

BOB ODOM, ET AL.,

*Petitioners,*

versus

DONALD M. JOHNSON,

*Respondent.*

**Petition For A Writ Of Certiorari to the United States Court Of Appeals For The Fifth Circuit**

## RESPONSE BRIEF TO PETITION FOR CERTIORARI

MILTON DALE PEACOCK,
Counsel of Record
One Wood Street
Monroe, LA 71201
(318) 388-4205

*Attorney for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

# TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 5

CONCLUSION ..... 9

**APPENDIX**

A. Frederick C. White Affidavit ..... A-1

B. Jerry Doles Affidavit ..... B-1

C. William W. Head, Jr., Affidavit ..... C-1

D. Jack Ray Affidavit ..... D-1

E. Jimmy Muse Affidavit ..... E-1

F. William D. Batey Affidavit ..... F-1

G. Shirley Fortenberry Affidavit ..... G-1

# TABLE OF AUTHORITIES

Page

## CASES

*Butz v. Economou*, 438 U.S. 478 (1978) ..... 4, 5, 9

*Forrester v. White*, 484 U.S. 219 (1988) ..... 7, 9

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982) ..... 3, 9

*Johnson v. Odom*, 910 F.2d 1273 (5th Cir. 1990) ..... 4, 5-6, 8, 9

*LeClair v. Saunders*, 627 F.2d 606 (2nd Cir. 1980), certiorari denied 101 S.Ct. 1418 ..... 8

## STATUTES

Fed. R. Civ. P. 56(c) ..... 5

No. 90-782

In The

# Supreme Court of the United States

October Term, 1990

BOB ODOM, ET AL.,

*Petitioners,*

versus

DONALD M. JOHNSON,

*Respondent.*

**Petition For A Writ Of Certiorari to the United States Court Of Appeals For The Fifth Circuit**

## RESPONSE BRIEF TO PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Please accept herein the response of Donald M. Johnson to the petitioners' request for review on the singular issue of whether they are entitled to absolute immunity from suit herein. It must not be forgotten that this matter comes to this honorable court seeking reversal of the denial of petitioners' motion for summary judgment on this issue. Two district courts denied this motion as did the federal appellate court. Petitioners now request, in their last attempt to avoid a trial on the merits, this

honorable court to garb them with the same absolute immunity accorded to the judiciary.

## STATEMENT OF THE CASE

While petitioners have set forth the facts with some accuracy, there obviously exists the inevitable slant of the advocate which arises in every adversarial proceeding. Therefore, a less-biased factual recitation may be found in the magistrate's report and recommendation located at D-2 of petitioners' exhibits. He wrote:

> "The facts which form the basis of this suit are alleged to be as follows. Plaintiff alleges that he was approached on various occasions in 1980 and 1982 to provide monetary campaign contributions for Bob Odom, the Commissioner of Agriculture for the State of Louisiana. He alleges that he provided $150.00, but refused to pay the $500.00 requested. He alleges that because of such refusal he was subsequently charged with violating the Louisiana Pesticide Law. He asserts that the Louisiana Department of Agriculture encouraged perjured testimony to adjudicate plaintiff guilty of violating the Louisiana pesticide laws. He further alleges that defendants violated plaintiff's equal protection and due process rights by singling him out for prosecution and revocation of his license, and using evidence obtained against him unconstitutionally because of his failure to contribute to the campaign as requested. For the first motion for summary judgment, plaintiff submitted several affidavits to this effect."

To assist this honorable court in its review of the denial for summary judgment by allowing it to see what the

lower courts had before them, the respondent attaches in the Appendix to this brief seven (7) of the affidavits in the record.

The first district court to deny the petitioners' motion for summary judgment on the issue of absolute immunity stated as follows:

> "This court finds that the defendants are not entitled to absolute immunity. Odom, the members of the ACP, and Rinicker do not hold offices which demand such protection. In order for an official to be entitled to absolute immunity, he must show (1) that the responsibility of his office embraces a function so sensitive as to require a total shield from liability; and (2) that he was discharging the protected function when performing the act for which liability is asserted. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2735, 73 L.Ed.2d 396 (1962). [Sic.] Here, the job duties of the defendants are not so sensitive as to require a total shield from liability."
>
> Petitioners' exhibits, E-7 fn.9.

The next district court to deny petitioners' claim for absolute immunity adopted a magistrate's report and recommendation, which in pertinent part set forth the following:

> "Although the Commissioner of Agriculture and the Commission serve as a fact finding body, they do not assert that anything resembling the safeguards applicable to the hearing examiners with the Federal Department of Agriculture are in effect with the Louisiana Department of Agriculture. The undersigned therefore agrees with the previous court ruling to the effect that the Commissioner of Agriculture and the Agriculture Commission are not officers which embrace

> a function so sensitive as to require a total shield from liability as contemplated by the Supreme Court in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1967). [Sic.] Furthermore, the plaintiff in this case asserts that the Commission and Commissioner were engaged in activities which went beyond the decision-making process when they committed the alleged wrongs of which the plaintiff complains in this case."
>
> Petitioners' exhibits, D-8.

The Fifth Circuit Court of Appeal also denied petitioners' claim for absolute immunity. That court noted the following: "The affidavits submitted by Johnson support his allegations that the defendants encouraged others to commit perjury against Johnson and sought to harm his business by singling him out for prosecution and for revocation of his cropduster's license." Petitioners' exhibits, B-7. The court then expressly found that these "pleadings and affidavits contained allegations that Odom and the Commission members went beyond the scope of their decision-making authority when they committed the alleged wrongs." Petitioners' exhibits, B-9.

In denying petitioners' request for a rehearing, the Fifth Circuit used certain language which petitioners claim impermissibly added another "prong" to the absolute immunity criteria set forth in *Butz v. Economou*, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978). This petition for a writ of certiorari raises the single issue: Did the Fifth Circuit Court of Appeal erroneously fail to reverse the lower court's (in fact, only the second district court ruling adverse to petitioners was before the appellate court, inasmuch as petitioners did not seek review from

the first ruling found in Petitioners' exhibits, E-1, et seq.) denial of petitioners' motion for summary judgment on the sole issue of absolute immunity by wrongly adding another *Butz* safeguard?

## ARGUMENT

It is submitted that petitioners' very able counsel has framed the issue and his argument in a fashion which might cause one at first blush to believe that merit exists therein. It is prayed that this response will adequately reveal the lack of merit to first blushes and to this writ application.

This honorable court does not need elucidation from this writer or an affliction of citationitis to set forth the standards of review pertaining to a motion for summary judgment. Fed. R. Civ. P. 56 (c) clearly and simply sets forth that a summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The appellate court correctly announced that principle (with appropriate caselaw) at B-7 of petitioners' exhibits. It is respectfully submitted that the motion for summary judgment was property denied under the particular facts of this case.

It appears clear that petitioners have abandoned for review at this stage their claim for qualified immunity. The Fifth Circuit correctly set forth the burden of overcoming such a qualified immunity claim thusly: "The

plaintiff must show that, at the time of the alleged violation, the defendants' actions were such that a reasonable officer would know they were unlawful." Petitioners' exhibits, B-5. The affidavits included in the Appendix meet this burden easily, certainly insofar as a motion for summary judgment is concerned.

The question before this court is whether the petitioners are entitled to absolute immunity on their motion for summary judgment in light of the extant affidavits and the law. Notwithstanding petitioners' Chicken Little claim that "the sky is falling" insofar as the absolute immunity afforded judges is involved, such is clearly not the case. Petitioner, Bob Odom, is an elected Louisiana official who is head of the Department of Agriculture. The record reflects that he has used his own employees to solicit campaign funds from the very individuals he is charged with regulating. The record, also, presents evidence that he attempts to crush economically those regulatees who do not acquiesce to his financial demands.

The affidavits allege that Mr. Odom and some of the petitioners are not adverse to creating from their own employees and using perjured testimony to accomplish their desired goals. The record further sets forth an invidious type of selective prosecution against the respondent which flies in the face of basic notions of fairness and equal protection.

Counsel for petitioners states, "Absolute judicial immunity is just that: absolute." Page 15 of Petitioner's application. That is the protection these petitioners seek. Respondent avers that the lower courts did not err in

denying these individuals that type of protection from their actions.

This honorable court has recognized (as to a state-court judge) that absolute judicial immunity is not absolute in the purest form that petitioners assert. See, e.g., *Forrester v. White*, 484 U.S. 219, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988). In an unanimous opinion the court denied absolute judicial immunity for a state-court judge charged with sexual discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The court acknowledged that it "has generally been quite sparing in its recognition of claims to absolute official immunity." 484 U.S. at 224. The court further stated, " . . . we should be at least as cautious in extending those immunities as we have been when dealing with officials whose peculiar problems we know less well than our own." Ibid at 226. And appropriate to this analysis is the following:

> "Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches."
>
> Ibid at 227.

In their application herein, petitioners implicitly ask this honorable court to consider their request for absolute immunity in light of their official roles without a *proper* consideration of the function at issue. Unlike a judge who performs necessary and limited functions in every case,

the petitioners herein, as to the state pesticide laws, perform all the functions in Louisiana of investigation, prosecution, testification, adjudication and penalty imposition.

Petitioners assert at page 11 of their application that they are "insulated from political influence." The affidavits factually allege an entirely different scenario. The Fifth Circuit recognized this when it denied petitioners' application for rehearing by stating that respondent "set forth sufficient facts at least to allege that the ACP was politically influenced by Odom and did not act independently. . . . " Petitioners' exhibit, A-2. In fact, the commission members petitioners are subject to the regulation and control of the petitioner Odom. The White affidavit, found in the Appendix beginning with A-1, avers that one of the petitioners violated the pesticide law on at least one occasion and was subject to punishment. However, his "sins" were washed away by the cleansing power of one of the other petitioners.

Selective enforcement of the laws by government officials has for some time been recognized as actionable. See, e.g., *LeClair v. Saunders*, 627 F.2d 606 (2nd Cir. 1980), certiorari denied 101 S.Ct. 1418. It is submitted that all three of the lower courts correctly denied petitioners' claim for absolute immunity for the reasons stated:

(1) "The job duties of the defendants are not so sensitive as to require a total shield from liability" (Petitioners' exhibit, E-7, fn. 9);

(2) The affidavits allege that petitioners "were engaged in activities which went beyond the decision-making process when they committed the alleged wrongs of which the plaintiff complains in this case" (Petitioners' exhibit, D-8); and

(3) "Johnson's pleadings and affidavits contained allegations that Odom and the Commission members went beyond the scope of their decision-making authority when they committed the alleged wrongs" (Petitioners' exhibit, B-9).

These decisions were not inconsistent with this court's rationale in *Butz v. Economou,* supra. They are entirely consistent with the court's ruling in *Forrester v. White,* supra.

There is a necessary interplay between *Butz* and *Harlow v. Fitzgerald,* 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). The Fifth Circuit recognized and properly applied that interplay in its opinion. See B-9 in petitioners' exhibits. Respondent will not paraphrase or restate that analysis and finding, which appears quite sound under the circumstances of this particular case.

## CONCLUSION

Contrary to petitioners' assertions, the judiciary is not under attack herein. Nor has the Fifth Circuit in its ruling sought to add another "prong" to the three-part *Butz* test. In *Forrester v. White,* supra, this honorable court stated, "Absolute immunity, however is 'strong medicine, justified only when the danger of [officials' being] deflect[ed from the effective performance of their duties] is very great.' " (Cite omitted.) 484 U.S. at 230. The Fifth Circuit correctly recognized that these petitioners (defendants) are not entitled to the "strong medicine" available in *Butz.* They certainly have not made a showing that they are entitled to such a potion, and it is averred by the respondent herein that such a prescription, if allowed,

would prove a fatal dose to the citizenry of Louisiana who still seek for the elusive concept of "justice."

Respectfully submitted,

MILTON DALE PEACOCK
Attorney at Law
One Wood Street
Monroe, Louisiana 71201
(318) 388-4205

# APPENDIX

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED FREDRICK C. WHITE, who after being by me first duly sworn, did depose and say that:

He was employed by the Louisiana Department of Agriculture (DOA) from early 1980 until October 1983, as Coordinator-Pesticide Enforcement.

During this period of time and during the scope of his employment with the DOA, he was aware of various details concerning the DOA's handling of numerous cases against Donald M. Johnson (Johnson), a crop duster in East Carroll Parish, who was the target of numerous investigations by the DOA.

As Coordinator-Pesticide Enforcement for the DOA, the affiant herein was instructed by Butch Calhoun and John Impson, officials with DOA, in the course of his employment to find anything he could against Johnson so that the DOA could use its authority to punish Johnson.

During the course of a meeting involving unclassified employees, the affiant heard Winston Riddick (the attorney for the DOA), Calhoun and Impson say that Johnson was to be made an example for other cropdusters who might choose to resist the DOA, because Johnson

fought the hardest against the DOA for what he believed to be right.

The affiant, who is personally aware of the three hearings held by the DOA in 1982 and 1983 against Johnson (and/or his corporation, Transylvania Flying Service, Inc.), was aware that the DOA, through its officials Calhoun and Impson, always wanted the maximum penalties available imposed on Johnson, which included large monetary fines and license and/or certification suspensions.

Furthermore, he shows that he was present during numerous conversations in 1982 and 1983 involving Calhoun and Impson, wherein the latter two stated that they needed to call members of the Advisory Commission on Pesticides (ACP) before hearings on charges against Johnson by the DOA in order to influence the vote of the ACP against Johnson. The affiant shows that it was a standard policy for Impson and Calhoun to call certain ACP members before violations hearing in order to influence the vote of the ACP against the target of the DOA.

The affiant shows that his knowledge of the power structure within the DOA causes him to believe that all of the decisions made against Johnson by the DOA were made with the knowledge and approval of Bob Odom, the Commissioner of the DOA, because all decisions involving significant matters had to be approved by the Commissioner.

Also, he shows that Impson, Calhoun and Riddick often had questions about the validity of some of the charges they filed against Johnson, but their approach was to charge him with every violation available, to get

the ACP to recommend a maximum fine and suspension and to make Johnson "spend some money" to defend himself.

The affiant shows that the activities of the aforementioned officials within the DOA resulted in the hearings against Johnson being mere shams more likened to "kangaroo courts."

He was further made aware that certain members of the ACP – in particular, Tom Cashio, Jeff Calloway and Grady Coburn – were more susceptible to the demands of the DOA made by Calhoun and Impson.

The affiant also shows that Calhoun discovered that one of the members of the ACP, Jeff Calloway, violated on at least one occasion the pesticide law of which the DOA was charged with enforcing, and that Calhoun took the steps necessary to insure that Calloway was *not* properly punished for his violation.

Additionally, he shows that he discovered another significant violation of the pesticide law by Ray Hensgens, which violation involved Azodrin and was corroborated by test results performed at the LSU lab. The affiant was told by Calhoun that these results were communicated to Impson and Odom, but the latter ordered new tests which results came back "clean" on the second run, thereby "exonerating" Hensgens, who was then a member of the ACP.

The affiant shows that it was very clear to him that the DOA was not treating Johnson fairly or even-handedly, and that Calhoun and Impson, in particular, were

intent upon making an example of Johnson, with the full approval and support of Odom.

He shows that there existed other cases where friends of Odom, Calhoun and Impson, who were blatantly guilty of pesticide violations, were given hand-slappings because of their friendship with "the Commissioner."

The affiant shows that the was also present during another meeting with DOA officials, when he overheard a conversation between Calhoun and Impson involving Johnson and Tommy Shields, an inspector with the DOA in East Carroll Parish. The affiant heard Impson and Calhoun discussing the fact that Sheilds was going to be brought down to Baton Rouge where he would either have to change his story against Johnson or be terminated from the DOA. The affiant shows that the "change in story" referred to false testimony Shields would be required to give against Johnson in order to help the ACP find Johnson guilty of violating the Louisiana Pesticide Law.

/s/ Fredrick C. White
FREDRICK C. WHITE

Sworn to and subscribed before me this 19th day of September, 1988, at Baton Rouge, Louisiana.

/s/ Janice G. Clark
NOTARY PUBLIC

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF MOREHOUSE

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED JERRY DOLES, who after being by me first sworn, did depose and say that:

He was an inspector with the Louisiana Department of Agriculture (DOA) in the years 1981-1982, and he was closely associated with Tommy Shields, Jr., who was also an inspector at that time with the DOA. The affiant shows that in 1981 Shields told him that he (Shields) had to "change his story" about Donald M. Johnson in order to present false testimony that Johnson (a commercial aerial applicator at the time) had improperly applied the herbicide 245-T in 1981. The affiant shows that Shields told him that Shields had to present the perjured evidence because of strong pressure put upon him to do so by certain officals within the DOA, in particular, Bob Odom, the Commissioner of the DOA, and Dean Hart and Preston Johnson, Shields' local supervisors and employees in the DOA. The affiant shows that he understands the perjured testimony by Shields was necessary for the DOA to find Johnson guilty of violating the Louisiana Pesticide Law.

/s/ Jerry Doles
JERRY DOLES

Sworn to and subscribed before me this 6th day of September, 1988, at September, Louisiana.

/s/ William H. Stephens
NOTARY PUBLIC

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF WEST CARROLL

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED William W. Head, Jr., who after being by me first sworn, did depose and say that:

He was an inspector with the Louisiana Department of Agriculture (DOA) in 1981 and was good friends with Tommy Shields, III, also an inspector the DOA. In 1981, Shields told the affiant that he had to "change his story" regarding Donald M. Johnson, a cropduster in East Carroll Parish, who Shields was investigating. Shields told the affiant that he had to fabricate the facts concerning a 245-T application by Johnson, because of instructions from his superiors in the DOA, Butch Calhoun and John Impson, who were intent upon finding Johnson guilty of violations of the Louisiana Pesticide Law.

Mike Kovac, a inspector with the DOA, told the affiant to go collect campaign contributions for Bob Odom, from John Vinning, who was a cropduster, in East Carroll and Don Raley who is in the Seed and Chimical business in EAst Carroll, both regulated by DOA/ The affiant said it was to be done on state time and state truck. The affiant said he talked to State Rep. Archie Crosby, and was told that it was unlawful for state

workers to do this, and the affiant said he would not collect campaign contributions for Bob Odom.

/s/ William W. Head, Jr.

Sworn to and subscribed before me this 28th day of September, 1988, at Oak Grove, Louisiana.

/s/ William H. Stephens
Notary Public

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF OUACHITA

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED JACK RAY, who after being by me first sworn, did depose and say that:

He was an inspector and supervisor with the Louisiana Department of Agriculture (DOA) in the years 1981-1982 (as well as during other years) and was closely acquainted with Tommy Shields, Jr., who was an inspector with the DOA during this period of time. The affiant shows that Shields gave indications several times during 1981-1982 that he (Shields) had to "change his story" about Donald M. Johnson, a commercial aerial applicator in East Carroll Parish at that time. The affiant shows that Shields had direct reference to a 1981 aerial application by Johnson to a crop of the herbicide 245-T, which Shields would *falsely* testify to against Johnson. The affiant was led to believe that Shields had to present this perjured testimony against Johnson, because of pressure put on Shields by two of his supervisors in the DOA, Dean Hart and Preston Johnson. The purpose of this false evidence was to allow the DOA to find Johnson guilty of violating the Louisiana Pesticide Law.

/s/ Jack Ray
JACK RAY

Sworn to and subscribed before me this 9th day of September, 1988, at Monroe, Louisiana.

/s/ M Dale Peacock
NOTARY PUBLIC

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF EAST CARROLL

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED JIMMY MUSE, who after being by me first sworn, did depose and say that:

He is a farmer in East Carroll Parish and has known Tommy Shields, Jr., for many years. In 1981 the affiant asked Donald M. Johnson, a cropduster in East Carroll Parish to apply to his rice crop the herbicide 245-T, but Johnson told the affiant that he could not apply the 245-T without a waiver from Shields, who was then an inspector with the Louisiana Department of Agriculture (DOA). The affiant contacted Shields who told the affiant to tell Johnson to go ahead and apply the 245-T and that Shields would give Johnson the required waiver later.

On December 7, 1982, the affiant testified in Baton Rouge, Louisiana, before the Advisory Commission on Pesticides (ACP) with the DOA as to the aforementioned facts. On that same day the affiant heard Shields also testify, but Shields denied under oath the true facts – i.e., he (Shields) had told the affiant and Johnson that the latter could apply the 245-T and that Shields would later give Johnson the requisite waiver.

/s/ Jimmy Muse
JIMMY MUSE

Sworn to subscribed before me this 1st day of September, 1988, at Transylvania, Louisiana.

/s/ William H. Stephens
NOTARY PUBLIC

---

UNITED STATES OF AMERICA

STATE OF LOUISIANA

PARISH OF OUACHITA

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified,and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED WILLIAM D. BATEY, who after being by me first sworn, did depose and say that:

He was an entomologist and inspector with the Louisiana Department of Agriculture (DOA) from 1968 to 1985. In the winter of 1983, Bob Odom, the Commissioner of the DOA, told the affiant to collect campaign contributions for him in the amount of $500.00 from Brown McLemore and Ken Thornhill, two sweet potato farmers, whose crops the affiant was charged by the DOA with inspecting. Odom told the affiant to bear down on the farmers if they failed to contribute financially to Odom's re-election campaign. In following these orders, the affiant gave $100.00 in cash and collected $200.00 from each farmer. The affiant understood that he would lose his job with the DOA if he failed to follow Odom's orders.

/s/ William D. Batey
WILLIAM D. BATEY

Sworn to and subscribed before me this 27th day of September, 1988, at Monroe, Louisiana.

/s/ M Dale Peacock
NOTARY PUBLIC

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF EAST CARROLL

AFFIDAVIT

BEFORE ME, the undersigned authority, duly commissioned, qualified, and sworn in and for the state and parish aforesaid, PERSONALLY CAME AND APPEARED SHIRLEY FORTENBERRY, who after being by me first sworn, did depose and say that:

She had a phone conversation with Bob Odom, the Commissioner of the Louisiana Department of Agriculture (DOA), in the early spring of 1983. This conversation concerned Donald M. Johnson, a cropduster in East Carroll Parish, whom the DOA was punishing for alleged violations of the Louisiana Pesticide Law. Odom told the affiant that Johnson would have been "all right" if he would have just "kept his mouth shut" and "left everything alone." However, Odom said Johnson must receive the punishment prescribed for him by the DOA, because he would not accept his punishment quietly.

/s/ Shirley Fortenberry
SHIRLEY FORTENBERRY

Sworn to and subscribed before me this 1st day of September, 1988, at Transylvania, Louisiana.

/s/ William H. Stephens
NOTARY PUBLIC

Supreme Court, U.S.
FILED
MAR 12 1991
OFFICE OF THE CLERK

(3)

NO. 90-782

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1990

BOB ODOM, ET AL,
Petitioners

versus

DONALD M. JOHNSON
Respondent

On Petition for a Writ of Certiorari
to
The United States Court of Appeals
For the Fifth Circuit

## REPLY TO BRIEF IN OPPOSITION

C. JAMES GELPI, P.C., Counsel of Record
J. KEITH HARDIE, JR.
203 Carondelet St., Suite 907
New Orleans, LA 70130

(504) 522-1153

Pel Hughes Printing, Inc., 134 Carondelet St., New Orleans, LA (504) 523-2618

# TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

ARGUMENT ..... 1

CONCLUSION ..... 5

CERTIFICATE ..... 6

## TABLE OF AUTHORITIES

Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986) ..... 2,3

Beard v. Udall, 648 F.2d 1264 (9th Cir. 1981) ..... 2

Butz v. Economou, 438 U.S. 478 (1978) ..... 5

Holloway v. Walker, 765 F.2d 517 (5th Cir. 1985) ..... 4

Johnson v. Odom, 470 So.2d 988 (La. App. 1st Cir. 1985), writ denied, 476 So.2d 355 (1985) ..... 1

Johnson v. Odom, 536 So.2d 541 (La. App. 1st Cir. 1988) .. 1

Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980) ..... 2

Sparks v. Duval Ranch Co., 604 F.2d 976 (5th Cir. 1979), aff'd sub nom Dennis v. Sparks, 449 U.S. 24 (1980) ..... 1

## ARGUMENT

In the appendix to his Response Brief, Respondent Donald Mack Johnson ("Johnson") placed before this court a series of inflammatory affidavits alleging various and sundry violations of his constitutional rights. Do not be misled. These affidavits are not only factually inaccurate[1], they are also irrelevant to the issues before this court.

To argue at this stage over the validity or strength of the evidence would be to fall into the very trap set by Johnson. Whether the petitioners acted as the affidavits suggest, though strongly denied, is not at issue here. The questions of fact raised by the affidavits need be reached only if the defendants are held to lack absolute immunity.

When absolute immunity for quasi-judicial and quasi-prosecutorial is claimed, the proper focus is on the acts which cause the harm, not on some alleged underlying conspiracy, motive or intent[2]. In Sparks v. Duval Ranch Co., 604 F.2d 976

---

[1] Respondent failed to advise this court that the affiants were deposed after they provided the affidavits and that the testimony given in those depositions compromised and often contradicted the affidavits. The depositions were attached to the defendants' Motion for Summary Judgment and for Reconsideration, found in the record at p. 255.

[2] In the instant case, the harm alleged was the result of administrative hearings in which fines were levied and the licenses of respondent and his corporation were suspended or revoked. Every administrative hearing was appealed by Johnson to the state courts. See Johnson v. Odom, 470 So.2d 988 (La. App. 1st Cir. 1985), writ denied, 476 So.2d 355 (1985) and Johnson v. Odom, 536 So.2d 541 (La. App. 1st Cir. 1988). Also, other state court litigation involving the same facts alleged herein has been initiated by Johnson. See Exhibits D3, D4, D5, and D7, attachments to the record at p. 63.

(5th Cir. 1979), aff'd sub nom Dennis v. Sparks, 449 U.S. 24 (1980), the allegations were analogous to those made by Respondent, and the court rejected them:

> The material allegations in this case are . . . that [the] state judge . . . conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to grant, prohibiting plaintiffs from producing certain oil. It is claimed that one of the defendants . . . bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. [The state judge] was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed.
>
> Sparks, supra at 978.

In Ashelman v. Pope, 793 F.2d 1072 (9th Cir. 1986), the Ninth Circuit overruled earlier decisions in which it had held that the motivations of a judge could be considered in determining if he was entitled to absolute immunity. Prior to Ashelman, the Ninth Circuit had held that a judge who made an ex parte agreement to decide a case in a certain way would not be immune because the "prior agreement is deemed the essential cause of any deprivation of federally protected rights." Beard v. Udall, 648 F.2d 1264 (9th Cir. 1981); see also Rankin v. Howard, 633 F.2d 844 (9th Cir. 1980). After noting that the "ultimate acts in Beard and Rankin were obviously judicial in nature," the 9th Circuit, en banc, overruled Beard and Rankin because those cases had "focused not on these ultimate acts but rather on the act of conspiring to predetermine the outcome of the proceeding." Ashelman, 793 F.2d at 1077. The court went on:

There appears to be no other authority for making the underlying conspiracy the determinative act in deciding whether immunity should be available. Judges' immunity from civil liability should not be "affected by the motives with which their judicial acts are performed." Intent should play no role in immunity analysis. Moreover, allegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence.

The primary policy of extending immunity to judges and to prosecutors is to ensure independent and disinterested judicial and prosecutorial decisionmaking. To effectuate this policy, we will broadly construe the scope of immunity. To foreclose immunity upon allegations that judicial and prosecutorial decisions were conditioned upon a conspiracy or bribery serves to defeat these policies.

We conclude that our prior decisions construed the immunity doctrines too narrowly by focusing on underlying actions instead of looking to the ultimate acts. . . . We therefore hold that a conspiracy between a judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors. As long as the judge's ultimate acts are judicial actions taken within the court's subject matter jurisdiction, immunity applies. Prosecutors are absolutely

> immune for quasi-judicial activities taken within the scope of their authority.
>
> Ashelman v. Pope, 793 F.2d at 1077-9 (citations omitted).

Respondent's suggestion that this court should consider his allegations of impropriety was also rejected in Holloway v. Walker, 765 F.2d 517 (5th Cir. 1985), cert. denied, 474 U.S. 1037(1985), where the court held:

> where the alleged harm, though resulting from a bribe or conspiracy, was inflicted by acts to which absolute immunity would apply, the complaint is insufficient to avoid judicial immunity.
>
> Holloway, supra at 523.

The "ultimate acts" which Johnson alleges caused him harm were decisions rendered by an administrative tribunal: the suspension of his license and the fines he received. Because the "ultimate acts" of the defendants were either judicial[3] or prosecutorial[4] in nature, the motivation of the parties or any

---

[3] The ACP members were acting in a judicial capacity when they recommended that Johnson's license be suspended or revoked and that he be fined, and Odom was acting in a judicial capacity when he rendered his decisions on the innocence or guilt of Johnson and imposed penalties.

[4] Defendants Impson and Calhoun were acting within the scope of their prosecutorial authority when they decided to prosecute Johnson. See Footnote 9 at page 13 of the Petition for Certiorari.

underlying ex parte agreement to decide the case in a certain manner — even if one did exist — is irrelevant to the question of immunity.

## CONCLUSION

The question before this court is whether administrative officials must prove they complied with administrative procedures in order to claim absolute immunity. This court's decision in Butz v. Economou, 438 U.S. 478 (1978), makes no such requirement. The question of absolute immunity in this case can be resolved by reference to the statutory and regulatory procedural protections afforded the respondent by state law. The allegations of underlying acts made by the Respondent are irrelevant and should be ignored.

Respectfully submitted,

C. JAMES GELPI
J. KEITH HARDIE, JR.
ATTORNEYS FOR PETITIONER
203 Carondelet Street, Suite 907
New Orleans, Louisiana 70130
Telephone: (504) 522-1153

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing have been mailed, postage prepaid, to Mr. Milton Dale Peacock, One Wood Street, Monroe, Louisiana 71201. I further certify that all parties required to be served have been served.

New Orleans, Louisiana, this _____ day of March, 1991.

_____